NOV 21 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-626

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

HAROLD G. O'BRIEN, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

BENJAMIN LIPSON, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

PATRICK E. GORMAN, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

GEORGE VEST, JR., ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

J. J. O'DONNELL, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

EDWARD T. HANLEY, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MILES G. SEELEY,
BRYSON P. BURNHAM,
STEPHEN M. SHAPIRO,
231 South LaSalle Street,
Chicago, Illinois 60604,
Attorneys for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT.
231 South LaSalle Street,
Chicago, Illinois 60604,
312-782-0600.

Gunthorp-Warren Printing Company, Chicago • 346-1717

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statute Involved 3

Statement of the Case 3

Reasons for Granting the Writ 7

Conclusion 14

Appendix A1

TABLE OF AUTHORITIES

Cases Cited

Brown Shoe Co. v. United States, 370 U. S. 294 (1962) .. 11

C. A. B. v. Aeromatic Travel Corp., 489 F. 2d 251 (2nd Cir. 1974) 7, 8, 12

Carter v. American Telephone & Telegraph Company, 365 F. 2d 486 (5th Cir. 1966) 13

Chambers v. Beatty, 281 F. Supp. 711 (S. D. N. Y. 1968) 6

Chicago Mercantile Exchange v. Deaktor, 414 U. S. 113 1973) 6, 7

Cohen v. Beneficial Loan Corp., 337 U. S. 541 (1949) .. 11, 12

Drexler v. Southwest Dubois School Corporation, ... F. 2d ....., No. 72-1918 (7th Cir. Oct. 15, 1974) .. 9

Eisen v. Carlisle & Jacquelin, ... U. S. ....., 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) 9, 12

Far East Conf. v. United States, 342 U. S. 570 (1952) .. 6

Gillespie v. U. S. Steel Corp., 379 U. S. 148 (1964) .. 10, 12, 13

Herbst v. International Telephone & Telegraph Corp., 495 F. 2d 1308 (2nd Cir. 1974) 14

Local No. 438 Construction & General Laborers' Union v. Curry, 371 U. S. 542 (1963) 9-10, 12

Local 734 Bakery Drivers Pension Fund Trust v. Continental Illinois National Bank and Trust Company of Chicago, ... F. Supp. ....., CCH Fed. Sec. L. Rep. ¶ 94,565 (N. D. Ill. 1974)..... 2

Mercantile Nat. Bank v. Langdeau, 371 U. S. 555 (1963) 11, 14

Ricci v. Chicago Mercantile Exchange, 409 U. S. 289 (1973) 6

Tank Car Corp. v. Terminal Co., 308 U. S. 422 (1940).. 6

Thill Securities Corp. v. New York Stock Exchange, 469 F. 2d 14 (7th Cir. 1972)..... 7

Statutes Cited

12 U. S. C. § 92(a)(a) 5

12 U. S. C. § 92(a)(j)..... 5

12 U. S. C. § 1818(b) 4, 5, 12

15 U. S. C. § 77(a) 4

15 U. S. C. § 78(a) 4

28 U. S. C. § 1291 .....3, 6, 7, 10, 11, 13

28 U. S. C. § 1292(b) 6, 13

28 U. S. C. § 1254(1)..... 2

28 U. S. C. § 1257 .....10, 11

Administrative Provisions Cited

12 C. F. R. § 9.12 5

12 C. F. R. § 19 6

17 C. F. R. § 240.10b-5..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

HAROLD G. O'BRIEN, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

BENJAMIN LIPSON, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

PATRICK E. GORMAN, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

GEORGE VEST, JR., ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

J. J. O'DONNELL, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

EDWARD T. HANLEY, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Continental Illinois National Bank and Trust Company of Chicago respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cases on October 11, 1974.

OPINIONS BELOW

The order of the District Court below, refusing to apply the doctrine of primary jurisdiction in these six cases, is reported at CCH Fed. Sec. L. Rept., ¶ 94,565 (May 10, 1974). The order of the Court of Appeals, dismissing the appeals from that order of the District Court on the ground that no "final" decision had yet been rendered, was not accompanied by an opinion and is not reported. Both of these orders are reproduced in the Appendix attached hereto.

JURISDICTION

The order of the Court of Appeals was entered on October 11, 1974, and this petition was filed within 90 days of that date.* The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED

The Comptroller of the Currency, pursuant to the powers vested in him by Congress under the National Banking Act and the Financial Institutions Supervisory Act, has established a pervasive scheme of regulation governing conflicts of interest in national banks. In these cases the District Court, faced with issues pertaining to the alleged existence and illegality of such conflicts between the trust and commercial departments of petitioner Bank, and within its trust department, refused to refer such issues to the Comptroller for initial decision, or to stay judicial proceedings pending an administrative hearing before

* On November 7, 1974, the Court of Appeals denied a timely petition for rehearing regarding its October 11, 1974 order.

the Comptroller. The question is whether the District Court's refusal to refer or to stay is separate from and collateral to the merits of the cases and therefore appealable as a final order under 28 U. S. C. § 1291.

STATUTE INVOLVED

The statute involved is 28 U. S. C. § 1291, which governs appeals from the district courts to the federal courts of appeals, and which provides in pertinent part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

STATEMENT OF THE CASE

Petitioner Continental Illinois National Bank and Trust Company of Chicago (hereinafter "Continental Bank" or "Petitioner") seeks review of a decision of the United States Court of Appeals for the Seventh Circuit which declined to entertain an appeal from an erroneous decision of the District Court. The District Court had determined that the Comptroller of the Currency did not have primary jurisdiction of the national bank "conflict of interest" issues raised in each of the cases here involved, and therefore held that judicial proceedings should proceed rather than be stayed pending administrative hearings before the Comptroller concerning the alleged conflict issues. The Court of Appeals decided thereafter that such determination of the District Court was "not final or otherwise appealable."

In each of the six actions instituted in the District Court below, plaintiffs-respondents (hereinafter, "plaintiffs"), suing as or on behalf of pension funds administered by the Trust Department of the Continental Bank as corporate trustee, alleged a wide variety of misconduct on the part of the trustee, including negligence and breach of duty with respect to the trusts in

question.* At the heart of each complaint, however, and indeed the foundation of the federal claim under the Securities Acts, was the allegation that the bank was guilty of an unrevealed "conflict of interest" in the administration of the funds in question simply because as trustee it had purchased for the plaintiff funds, in the open market, common stock issued by corporations having borrower relations with the Bank.**

Throughout their complaints, plaintiffs repeated the charge that Petitioner Bank had defrauded them by failure to reveal its supposed "conflict of interest." On this theory, plaintiffs sought to make the Bank a virtual insurer or guarantor of the prosperity of their trust investments.

Petitioner moved to dismiss the complaints in the District Court on the ground, *inter alia*, that the Comptroller of the Currency, under the powers and duties vested in him by Congress under the *Financial Institutions Supervisory Act* of 1966, 12 U. S. C. § 1818(b), *et seq.*, enjoyed exclusive jurisdiction

* Plaintiffs invoked the jurisdiction of the District Court below pursuant to the Securities Exchange Act of 1934, and the Securities Act of 1933, 15 U. S. C. § 78(a) *et seq.*, and § 77(a), *et seq.*, respectively. Plaintiffs placed principal reliance upon § 10(b) of the Securities Exchange Act, and S. E. C. Rule 10b-5 promulgated thereunder (17 C. F. R. 240.10b-5). Claims for alleged imprudent trust administration, ordinarily cognizable only in the state courts, were added as "pendent" to the Securities Acts claims (and, in the *Lipson* case, under diversity principles).

** It is not too much to say that if the plaintiffs' theory of "conflict of interest" in these cases should be sustained, large banks would be unable, as a practical matter, to administer trusts requiring a diversified portolio of corporate securities, despite the fact that Congress expressly has authorized national banks to carry on a trust business. A major bank would be crippled in its ability to make corporate loans if it could not lend to any entity whose securities were held in the bank's trust department. Conversely, the trust department of such a bank would be unable prudently to invest trust funds in securities of companies which were borrowers from the bank. The sweeping and injurious nature of the "conflict" theory advanced by plaintiffs, and its significance for the banking industry, are apparent when it is considered that Continental Bank, the eighth largest commercial bank in the United States, has commercial relations with a very substantial segment of the largest business cor-

with respect to such "conflict of interest" allegations. The District Court denied that motion on May 10, 1974, and at the same time ruled that the primary jurisdiction doctrine did not apply in these cases. Petitioner thereafter moved for reconsideration of the decision that the doctrine of primary jurisdiction was inapplicable. Petitioner cited legislative history indicating that Congress had delegated regulation of conflicts of interest of the kind charged in the present complaints to the appropriate banking regulator. That regulator is now the Comptroller of the Currency, who has prescribed a regulation which squarely governs conflicts of interest of the type alleged in the complaints. *See*, 12 C. F. R. § 9.12, promulgated pursuant to 12 U. S. C. § 92(a)(a) and § 92(a)(j). Moreover, the Comptroller of the Currency enjoys plenary authority to conduct hearings under the *Financial Institutions Supervisory Act* of 1966, 12 U. S. C. § 1818(b), *et seq.*, to determine whether, in the particular factual situation, a "conflict of interest" ever existed, and whether the rights and interests of trust beneficiaries were compromised thereby, and he has adopted a detailed code of evidentiary and procedural rules to govern in hearings before his

---

porations in the nation. The publicly disseminated 1973 Annual Report of Continental Illinois Corporation (fourth quarter, 1973), states as follows on page five: "The amount of outstanding loans in the Commercial Banking Department reached a record high of almost $5.5 billion. . . . Represented among the approximately 33,000 accounts in the department are 94 of the 100 largest U. S. corporations and 318 of the Fortune 500 list." These same large corporations, of course, are the best of the "blue-chip" companies, and a prudent trustee of large pension funds will inevitably have substantial holdings of securities issued by such companies. Nor is it tenable to maintain, as plaintiffs have urged in the District Court, that "disclosure" of the overlap is a workable requirement, since both the loan portfolio of a commercial banking operation and the investments of a large trust department are in a constant state of change. A duty of disclosure in the event of any overlap would imply a right in the trust beneficiaries to raise objections, which, considering possible difficulties and delays in prompt communication with them and indeed the difficulty of identifying many of them (such as contingent beneficiaries and remaindermen) would result in intolerable delays in the implementation of decisions on both sides of the bank.

hearing examiners. 12 C. F. R. § 19. In this regulatory context, Petitioner urged the District Court that the decisions of this Court required stay of proceedings pending administrative hearings. Petitioner cited *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289, 305-306 (1973) (holding that the District Court should stay proceedings to avail itself of the "aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern"), *Chicago Mercantile Exchange* v. *Deaktor*, 414 U. S. 113, 115 (1973) (holding that "the considered view of the Commission would be of sufficient aid to the Court that the action should not go forward without making reasonable efforts to invoke the jurisdiction of the Commission"), *Far East Conf.* v. *United States*, 342 U. S. 570, 574 (1952) (holding that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over"), and *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, 433 (1940) (holding that "when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand"). Cited also was *Chambers* v. *Beatty*, 281 F. Supp. 711 (S. D. N. Y. 1968) (holding that the decisions of this Court in the field of primary jurisdiction require reference of banking issues to the banking regulatory agencies under the *Financial Institutions Supervisory Act* of 1966).

On June 10, 1974, the District Court denied the motion for reconsideration of its primary jurisdiction holding and refused to stay proceedings pending administrative hearings before the Comptroller. Notices of appeal were timely filed in all six of the above-entitled cases on July 9, 1974, seeking review of the decision of the District Court refusing to stay proceedings. Those appeals were taken pursuant to 28 U. S. C. § 1291.* On

* On July 3, 1974, the District Court had declined to certify the orders of May 10, 1974 and June 10, 1974, for interlocutory appeal pursuant to 28 U. S. C. § 1292(b).

October 11, 1974, the Court of Appeals dismissed the appeals in these six cases, stating in its order of dismissal that the decision of the District Court was "not final or otherwise appealable."*

REASONS FOR GRANTING THE WRIT

The question in these cases is whether an order of the District Court, improperly refusing to refer complex and protracted litigation to an administrative agency for preliminary determination of matters falling within the primary jurisdiction of that agency, is appealable as of right pursuant to 28 U. S. C. § 1291. This petition for certiorari should be granted to resolve the conflict between the Second and Seventh Circuit Courts of Appeals regarding that basic question, as well as between the decision below and principles long recognized by this Court.

The Seventh Circuit in the instant cases adhered to its position, taken in *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F. 2d 14, 16 (7th Cir. 1972), that such orders relating to the primary jurisdiction doctrine are not appealable. This position is in conflict with the decision of the Court of Appeals for the Second Circuit in *C. A. B.* v. *Aeromatic Travel Corp.*, 489 F. 2d 251 (2nd Cir. 1974). In the *Aeromatic* case, the District Court had made an erroneous ruling respecting the necessity of referring the action before it to the Civil Aeronautics Board pursuant to the doctrine of primary jurisdiction. Despite the fact that the action was still in its preliminary stages, the Court of Appeals entertained an immediate appeal under 28 U. S. C. § 1291, saying (at page 253):

---

* On November 7, 1974, the Court of Appeals denied a petition for rehearing regarding the dismissal order of October 11, 1974. The effect of the dismissal of the appeals in these cases is that once again the Seventh Circuit has refused to implement the doctrine of primary jurisdiction as set forth in the decisions of this Court. *See, e.g., Chicago Mercantile Exchange* v. *Deaktor*, 414 U. S. 113 (1973), *reversing* the decision of the Court of Appeals for the Seventh Circuit in *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d 529 (7th Cir. 1973).

> "We must decide whether we have jurisdiction to hear this appeal. Under the teaching of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545-547, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), we believe that we have jurisdiction. *The issue of whether the doctrine of primary jurisdiction should be invoked is collateral to the ultimate issues of this case, the issue is vital to CAB efforts to secure speedy enforcement of the Federal Aviation Act and the Board's regulations, and the issue is too important to be deferred until the entire case is decided.*" (Emphasis supplied.)

Although in *Aeromatic* the court had *stayed* proceedings pending administrative action, whereas the converse is the situation here (since the District Court *declined to stay* proceedings as required by the doctrine of primary jurisdiction), each case nonetheless presents the question whether the threshold determination, under the doctrine of primary jurisdiction, as to which tribunal should initially consider the controversy, is appealable because (in part) it is separate from and independent of (and therefore "collateral to") the merits of the case. In the cases here, as in the *Aeromatic* case, the primary jurisdiction issue relates only to the preliminary question of which tribunal should first consider the controversy; that issue, we submit, is clearly collateral to the merits. And here, as in the *Aeromatic* case, the erroneous decision of the District Court threatens to disrupt the "enforcement" efforts of the administrative agency empowered by Congress to exercise supervision over a regulated industry. Finally, in both instances, it is clear that the issue is "too important" to be deferred until years have passed, hundreds of thousands of dollars have been expended, and the resources of the District Court have been taxed—until all six cases here have passed through the ordeal of trial to a judgment on the merits notwithstanding the reversible error which occurred at the very outset of the litigation. Despite the identity of the issues presented, the Court of Appeals for the Seventh Circuit here refused to follow *Aeromatic*.*

---

* Indeed, the October 11, 1974 decision of the Court below, dismissing the instant appeals, is also inconsistent in basic approach

The decision of the Seventh Circuit is also in conflict with the controlling interpretation of § 1291 adopted by this Court. In *Eisen* v. *Carlisle & Jacquelin* ..... U. S. ....., 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), the Court held that a District Court order, requiring the defendant in a class action to bear the cost of notifying members of the class of the pendency of suit, was a "final" order and thus appealable as of right. Accordingly, this Court approved immediate review of a decision which unfairly burdened the defendant in forthcoming litigation, and which denied the defendant a procedural right which the law guaranteed. This Court found two pertinent criteria controlling: *first*, the fact that the District Court's order was not "tentative, informal or incomplete," and, *second*, the fact that the District Court's order was not merely a step toward resolving the controversy on the merits, but rather was a "collateral" matter, ripe for review. 94 S. Ct. 2149-2150, 40 L. Ed. 2d 745. Those criteria are satisfied here, since the District Court has definitively resolved the primary jurisdiction question raised below (erroneously, we believe), and since its threshold decision respecting the proper routing of the controversy is clearly separate from and independent of the merits of the litigation.

The holding of the Seventh Circuit that the question whether a case should be referred preliminarily to an administrative agency is not collateral to the merits of the litigation and thus not final or appealable is also in conflict with the decision of this Court in *Local No. 438 Construction & General Laborers'*

---

with the decision of that same Court in *Drexler* v. *Southwest Dubois School Corporation*, ... F. 2d ....., No. 72-1918, handed down four days later, on October 15, 1974. In the *Drexler* case, the Court of Appeals for the Seventh Circuit held that an immediate appeal under 28 U. S. C. § 1291 was appropriate where the District Court had made an erroneous decision respecting the necessity of staying proceedings while the plaintiff exhausted her state court remedies. The Court of Appeals held that it is "only logical to consider this order to be a final judgment within the meaning of 28 U. S. C. § 1291. . ." Slip Opinion at page 3. This apparent inconsistency was called to the attention of the Court in a petition for rehearing but that petition was denied, without opinion, on November 7, 1974.

Union v. *Curry*, 371 U. S. 542 (1963). The *Curry* case is especially significant here because there, as in the instant cases, the order subject to appeal had erroneously determined that judicial action should *proceed* in derogation of the jurisdiction of a federal administrative agency. In *Curry*, the State Supreme Court had erroneously decided that jurisdiction should be exercised by the trial court over a controversy which fell within the exclusive jurisdiction of the National Labor Relations Board, despite the contention of defendant that exclusive jurisdiction resided in the Board. This Court subsequently held that such a decision respecting the proper routing of the controversy was a "final" decision, and thus reviewable pursuant to 28 U. S. C. § 1257. Its reasoning applied equally to the final order requirements of § 1291:

> "Whether or not the Georgia courts have power to issue an injunction is a matter wholly separate from and independent of the merits of respondents' cause. The issue on the merits, namely the legality of the union's picketing, is a matter entirely apart from the determination of whether the Georgia court or the National Labor Relations Board should conduct the trial of the issue. The jurisdictional determination here is as final and reviewable as was the District Court's decision in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, exempting plaintiffs in a stockholder's suit filed in a federal court from filing a bond pursuant to a state statute. That ruling was held a final judgment under 28 U. S. C. § 1291 even though the trial in the case was still to take place." Id. at 548-549.

The fact that the *Curry* case involved a question of exclusive jurisdiction and not primary jurisdiction makes no difference, for in each situation the preliminary decision respecting proper routing of the lawsuit is "wholly separate from and independent of," and therefore collateral to, the merits of the underlying cause of action.

The decision below is also inconsistent with the approach to the question of finality which this Court has adopted in *Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 152-154 (1946) and

in other cases. There, the Court held that the question of "finality" must be given a "practical rather than a technical construction," especially where a decision is "fundamental" to the further conduct of the litigation, and that in cases coming within what might be called the "twilight zone" of finality *immediate review is appropriate.* The Court also held that it is necessary to consider the "costs" which are likely to result if immediate review of a threshold error is not had. *Accord: Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545-47 (1949), and *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 306 (1962): "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure."*

The "practical" or "pragmatic" approach to the question of finality, adopted by this Court but not by the Seventh Circuit, requires consideration of a number of pertinent factors, rather than application of technical rules or formulae. We submit that these factors are present here:

First, the order appealed from is separate from and independent of, and therefore collateral to, the merits of the controversy for it does not resolve any question on the merits and indeed is unrelated to the merits. The Court of Appeals will be in no better position to resolve the primary jurisdiction question after a trial on the merits than it is now. It is clear that the Court of Appeals can now effectively review the threshold

* In this regard, *see also, Mercantile National Bank* v. *Langdeau,* 371 U. S. 555, 558 (1963), emphasizing the need to correct threshold decisions regarding the proper routing of litigation by immediate review: "Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U. S. C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." This analysis of "finality" under 28 U. S. C. § 1257 also applies to the question of "finality" under 28 U. S. C. § 1291. *See* the quotation from the *Curry* case on page 10 above.

jurisdictional question raised. *C. A. B.* v. *Aeromatic Travel Corp.*, 489 F. 2d 251, 253 (2nd Cir. 1974). *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U. S. 542, 543-550 (1963).

Second, the decision of the District Court is not "tentative," "informal," or "incomplete;" it is sufficiently settled or conclusive to admit of review. *See Eisen* v. *Carlisle & Jacquelin*, ... U. S. ....., 94 S. Ct. 2140, 2149, 40 L. Ed. 2d 732, 745 (1974). The District Court now intends to proceed with months of discovery and six lengthy trials—notwithstanding the primary authority of the Comptroller of the Currency over the administrative issues raised.

Third, the importance of the order appealed from, and the seriousness and difficulty of the issues raised, must also be considered. *See Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 547 (1949). In the six cases here involved, an issue of first impression is raised. No Court has ever determined (or even been called upon to determine) whether conflict of interest allegations running to the very structure of national banks should be referred, in the first instance, to the Comptroller of the Currency who has adjudicatory powers with respect to such allegations. The importance of the matter cannot be gainsaid. The proper allocation of business within the Federal system is in doubt. The uniform scheme of bank regulation is in jeopardy since reasonable coordination between court and agency has been forsaken. What is more, the Court below has burdened itself with administrative issues which require expertise and industry experience beyond its ken.

Fourth, an additional consideration is whether or not the order appealed from is "fundamental" to further proceedings in the Court below. *See Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 153-154 (1964). Under the statutory scheme the District Court should take into account the opinion of the Comptroller of the Currency, rendered after a full hearing under the *Financial Institutions Supervisory Act* of 1966, 12 U. S. C. § 1818(b), *et*

seq., and made in light of his expertise in monitoring "conflicts of interest" of the kind here alleged. The failure of the District Court to stay proceedings pending an administrative hearing required by law is an error which is fundamental to further proceedings below.*

Fifth, also relevant is the measure of injury which would result to the judiciary and the parties if immediate review were denied. The injury here involved, in terms of wasted judicial resources, is immense. If the District Judge below proceeds through discovery, and six lengthy trials (some of which involve broad classes of plaintiffs under Rule 23, F. R. Civ. P.), without clarification of a jurisdictional uncertainty, raised *in limine* and which bears with it the clear potential for reversal after trial on the merits, it is plain that an enormous sacrifice of judicial time and energy is threatened.** The cost to the parties here involved

* Since the issue of primary jurisdiction is "fundamental" to further court proceedings, and since the issue is surrounded with considerable difficulty, it is surprising that the District Judge did not certify his ruling with respect thereto pursuant to 28 U. S. C. 1292(b), which authorizes interim appeals. The fact that the primary jurisdiction ruling could have been certified (and indeed *should* have been certified) under § 1292(b) is an additional factor in favor of appealability under 28 U. S. C. § 1291. *See Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 154 (1964). "It is true that if the District Judge had certified the case to the Court of Appeals under 28 U. S. C. § 1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292(b) by treating this obviously marginal case as final and appealable under 28 U. S. C. § 1291 . . ." *See also, Carter* v. *American Telephone & Telegraph Co.*, 365 F. 2d 486, 489, n. 3 (5th Cir. 1966): "The interlocutory certification method has many attractions in primary jurisdiction reference situations . . ." Accordingly, the policies of Congress are furthered by allowing immediate review under § 1291 of a determination which should have been certified.

** *See Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 153 (1964):

> "[I]t seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided."

[footnote continued on next page.]

is also apparent. *See Herbst* v. *International Telephone & Telegraph Corp.*, 495 F. 2d 1308, 1313 (2nd Cir. 1974): "Judicial efficiency requires that appellate review be made before the parties and district courts have spent considerable time, effort, and money, on such actions."

In summary, the various criteria applied by this Court in determining appealability under 28 U. S. C. § 1291 are satisfied in these cases. Indeed, the most pressing considerations of policy and judicial efficiency require immediate review. In these circumstances, the Court below should have entertained an immediate appeal from the refusal of the District Court to respect the primary jurisdiction of the Comptroller of the Currency.

CONCLUSION

For the reasons stated above, this Court should grant the instant petition for certiorari to resolve the conflict between the Courts of Appeals for the Second and Seventh Circuits, as well as between the decision below and principles long recognized by this Court.

Respectfully submitted,

MILES G. SEELEY,
BRYSON P. BURNHAM,
STEPHEN M. SHAPIRO,
231 South LaSalle Street,
Chicago, Illinois 60604,
Attorneys for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
312-782-0600.

This philosophy should have guided the Court of Appeals below. *Accord: Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 558 (1963), refusing to delay consideration of a preliminary decision where "long and complex litigation . . . may all be for naught if consideration of the preliminary question of venue is postponed until conclusion of the proceedings."

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted: October 3, 1974
October 11, 1974

Before
Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

HAROLD O'BRIEN, et al.,
Plaintiffs-Appellees,

vs.

Nos. 74-1671, 74-1672
74-1673, 74-1674
74-1675, 74-1683

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 72-C-660, 73-C-3132, 72-C-2935, 73-C-772 and 73-C-46

Frank J. McGarr, Judge.

ORDER

This matter comes before the Court on the motion of plaintiffs-appellees in the above-entitled appeals for dismissal thereof and upon the response of defendant-appellant thereto.

Upon consideration thereof, It Is Ordered that the Clerk of this Court enter judgment dismissing the appeals above-named on the ground that the orders appealed from are not final or otherwise appealable.

Local 734 Bakery Drivers Pension Fund Trust, et al. v. Continental Illinois National Bank and Trust Company of Chicago.

United States District Court, Northern District of Illinois, Eastern Division. Nos. 72 C 2551, 72 C 2935, 73 C 46, 73 C 660, and 73 C 772. May 10, 1974.

McGARR, District Judge:

I.

The five cases before this Court allege violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U. S. C. § 78(j) and common law claims for breach of fiduciary obligations and contract. Jurisdiction is based on 15 U. S. C. § 78(aa) for the Federal claims and pendent jurisdiction is asserted as to the state-law claims. Additionally, in Cause No. 73 C 772, the plaintiff alleges violations of § 17(a) of the Securities Act of 1933, 15 U. S. C. § 77(q), and bases jurisdiction on 15 U. S. C. § 77(u). Besides the claim of pendent jurisdiction, diversity of citizenship (28 U. S. C. § 1332) is alleged to exist as to the state claims in this latter case.

Currently pending before this Court are the following motions:

1. Motions to dismiss all these cases for various reasons, including failure to state a claim upon which relief may be granted, lack of Federal jurisdiction, lack of capacity to sue and improper party plaintiff.

2. A motion to dismiss Counts I, III and V in Cause No. 73 C 772, which counts are brought under Section 17(a) of the 1933 Act, 15 U. S. C. § 17(q)(a).

3. A motion to dismiss Counts 9 through 13 in Cause No. 73 C 660 for lack of diversity of citizenship jurisdiction (28 U. S. C. § 1332).

4. A motion to dismiss Counts V and VIII of Cause No. 73 C 660 for lack of jurisdiction over the subject matter, and for failure to state a claim upon which relief can be granted.

The allegations of the five complaints, each with several plaintiffs, are sufficiently similar that the issues raised and the principles of law involved are generally the same for all.

It should be noted here that no leave has yet been granted to any plaintiff to proceed on behalf of a class. The class action determination is expressly reserved for later consideration.

No. 72 C 2551

Plaintiffs in this case are the trustees of Local 734 Bakery Drivers Pension Fund Trust ("Bakery Drivers"), the trustees of the Chicago District Council of Carpenters Pension Fund ("Carpenters"), the Trustees of The Chicago Area Retail Food Clerks Pension Fund ("Food Clerks"), the trustees of the Roofers' Pension Fund ("Roofers"), and the members of the Retirement Allowance Committee of the Chicago Transit Authority Retirement Plan ("CTA"). Plaintiffs also seek to bring this as a class action on behalf of all persons for whose trust or agency accounts the Bank purchased, sold or retained the named common stock without disclosing certain material information.

The plaintiffs allege that the Bank entered into a variety of relationships with the various plaintiffs, all of whom granted the Bank the discretion to purchase and sell securities on their behalf. They allege agreements with Food Clerks and with the Carpenters whereby the Bank agreed to act as agent for the investment of the pension funds, corporate trust agreements with the Drivers and the Roofers; and a retirement plan trust agreement with the CTA. Between February 1, 1968 and December 23, 1968, the Bank purchased, pursuant to its various agreements, 21,600 shares of Penn Central Company common stock, at a cost of approximately $1,250,000. It is alleged in Count I of the complaint that at the time of, or prior to, the purchases, Continental Bank had loaned substantial funds to Penn Central and had available to it detailed inside information with respect to the financial condition of Penn Central; that it failed to dis-

close to the plaintiffs that there existed a conflict of interest due to the Bank's dual position and that the Bank might be prohibited as an insider from trading in Penn Central stock. The plaintiffs further allege that due to this failure to inform them, they were induced to acquiesce in the purchases and to continue their relationship with and reliance upon the Bank. In June, 1970, shortly before Penn Central filed a petition in bankruptcy, the stock was sold with a resultant aggregate loss to the plaintiffs of approximately $1,000,000.

In Count II, the plaintiffs allege that the detailed information available to the Bank was used to make a complete financial analysis of Penn Central; that at the time of the purchases and up to the public announcement of Penn Central's petition in bankruptcy, the Bank knew and failed to disclose that Penn Central's stock was not of suitable investment quality and that Penn Central could not meet its working capital, debt service or dividend requirements, that it had accelerating losses and that the market price of its common stock was inflated. Count III alleges that Continental knew and failed to disclose the true financial status of Penn Central, that it delayed in selling the shares until shortly before or after the petition in bankruptcy and that the non-disclosure induced the plaintiffs to acquiesce in these matters. Count IV alleges that the Bank's interests were in continuous conflict with the plaintiff's and that it failed to sell the stock in order to protect its own interests. The remaining counts (5 through 8) are based upon breaches of contractual and fiduciary duties.

No. 72 C 2935

This eight-count complaint is brought by the trustees of the Chicago District Council of Carpenters Pension Fund ("Carpenters"). Pursuant to an agreement with the trustees, the Bank was appointed as agent with authority to invest in securities according to its discretion. The Carpenters claim that they lost $140,488.50 on the sale of 6,000 shares of common stock

issued by Management Assistance, Inc. ("MAI"), a corporation of which the Bank was the principal creditor. The remaining allegations set out basically the same claims as presented in 72 C 2551, the first four counts alleging violations of Section 10(b) of the Exchange Act and Rule 10b-5 and the latter four counts alleging breaches of contract and fiduciary duties by the Bank.

No. 73 C 46

This case was brought by the trustees of the Chicago Hotel Employees Pension Trust Fund ("Hotel Employees"), the trustees of the General Service Employees' Local Union No. 73 Employees' Pension Fund ("Service Employees"), the trustees of the Licensed Tugmen's and Pilots' Pension Fund ("Tugmen"), and the Trustees of the Dairy Employees'—Milk Dealers' Pension Plan Trust ("Dairy Employees"). Pursuant to trust agreements entered into with the plaintiff-trustees which granted it investment discretion, the Bank "bought" units of Continental Illinois Investment Trust for Employee Benefit Plans ("CIIT"). CIIT is a trust established under the laws of the State of Illinois with the Bank as trustee and consists of the commingled assets of more than 500 "qualified" trusts. As trustee of CIIT, the Bank invested in shares of Penn Central common stock, which upon ultimate sale, gave rise to a pro rata share loss of $23,700 to Hotel Employees, $3,000 to Service Employees, $15,000 to Tugmen, and $40,000 to Dairy Employees. The plaintiffs also seek to maintain this as a class action on behalf of all holders in CIIT units. The remaining substantive allegations in Counts I through 8 are essentially the same as those in 72 C 2551.

The question has been raised whether the entity known as Continental Illinois Investment Trust is amenable to suit. That issue is not being decided at this time, and the question is reserved for further consideration at a later date.

No. 73 C 660

The plaintiffs in this action are the trustees of the Credit Union National Association ("CUNA"). An agreement was entered into with these trustees by which the Bank was appointed an agent with investment discretion as to the purchase and sale of securities. It is alleged that the Bank's investment in Penn Central stock on plaintiff's behalf resulted in a loss to them of approximately $317,000. The plaintiffs also seek to maintain this suit as a class action on behalf of all persons with trust or agency accounts for whom the Bank purchased Penn Central shares. The remaining allegations in this eight-count complaint are similar to those in 72 C 2551, with the exception that the latter four counts are based upon diversity jurisdiction, 28 U. S. C. § 1332.

No. 73 C 772

The plaintiffs, officers of the Air Line Pilots Association, International ("Air Line Pilots") seek to maintain this action on behalf of themselves and also on behalf of the class of all airline pilots presently or formerly in the service of United Airlines ("United") who are beneficiaries of a pension plan established by United for its pilots ("Pension Plan"). ALPA is an unincorporated association organized as a labor organization and has actively represented pilots for purposes of collective bargaining since 1933. The United Pension Plan entered into an agreement appointing the Bank as trustee. Pursuant to its power of discretionary investment under the trust, the Bank purchased Penn Central common stock. The plaintiffs contend generally that Continental failed to disclose that it had substantial commercial loan relationships with Penn Central and that Penn Central was known to the Bank to be in a precarious financial position. The Pension Fund is alleged to have lost approximately $1,500,000 through the Bank's investment in this stock. Similar investments involving common stock of other companies, i.e., MAI, Trans World Airlines ("TWA"),

Lum's, Inc. ("Lum's"), and United States Freight Co. ("Freight Co.") allegedly resulted in a loss to the pension of $5,600,000. The Bank is alleged to have been a substantial creditor of each of these companies at the time it purchased their stock for the Pension Plan. It is further alleged that the Bank failed to disclose to the plaintiffs the detailed financial information regarding these companies and also that as a creditor of the same, a conflict of interest might exist.

All of the five cases discussed above are ordered consolidated, for purposes of discovery only. The question of consolidation for trial is reserved for future consideration.

II.

For this Court to have jurisdiction in most of these matters, the plaintiffs must sufficiently allege a violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. The defendant contends that these complaints fail to state claims cognizable under the Securities Act and moves for dismissal.

Section 10(b) of the Securities Exchange Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange,

(1) to employ any device, scheme or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

The defendant's first argument is that Section 10(b) does not reach the relationship between trustees and trust beneficiaries, nor does it provide a remedy for breach of contract. Initially this Court must recognize that the mere fact that the plaintiffs are beneficiaries under a trust agreement does not preclude them from bringing an action under § 10(b) for alleged fraud in the purchase or sale of securities on behalf of the trust. Appropriate plaintiffs in a Rule 10b-5 suit are not limited to a "purchaser or seller" of securities, the traditional requirement set out in the decision of *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (2d Cir., 1952), *cert. denied*, 343 U. S. 956. The statutory authorization for the rule refers to the prohibition of deceptive devices "for the protection of investors" and the Supreme Court in *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U. S. 6, 12-13, stated that the crux of that case was the fact that the plaintiff "suffered injury as a result of deceptive practices touching its sale of securities *as an investor*" (emphasis added). In reliance on this judicial and statutory authority, the Seventh Circuit in *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654 (7th Cir., 1973), expressly discarded the *Birnbaum* rule and extended the statutory protection to a broader class of persons. The emphasis in this circuit now is on "persons who, *in their capacity as investors*, suffer significant injury as a direct consequence of fraud in connection with a securities transaction, even though their participation in the transaction did not involve either the purchase or the sale of a security." (490 F. 2d at 659)

In essence, the defendant would have this Court limit the plaintiffs to such remedies as are locally available to mere beneficiaries of a discretionary trust. However we should not ignore the direction in *Tcherepnin* v. *Knight,* 389 U. S. 332, 336 (1967) that in construing the 1934 Act "form should be disregarded for substance and the emphasis should be on economic reality." In light of this directive, we are compelled to recognize that the defendant is not merely a passive safekeeper of funds but instead is actually an active money manager with whom the plaintiffs have entered into investment agreements, regardless of whether these are otherwise described as trust or agency agreements. Therefore, the plaintiffs may truly be described as "investors" and are thus within the class of persons to be protected by Rule 10b-5.

The next question for our consideration is whether the claims allege merely breaches of contract and fiduciary duty, and as such fail to allege fraud "in connection with the purchase or sale" of a security. First, this Court reads the complaints to allege failure to disclose material information in violation of Rule 10b-5. Whether they also set forth claims for breaches of contract or of fiduciary duty becomes irrelevant. The Supreme Court, in the *Bankers Life* case, made it clear that Federal securities law was appropriate in a fraud situation notwithstanding the availability of a state remedy. 404 U. S. at 12. Secondly, the purpose of Rule 10b-5 is to prohibit all fraudulent schemes in connection with the purchase or sale of a security. *James* v. *Gerber Products Co.,* 483 F. 2d 943 (6th Cir., 1973); *A. T. Brod* v. *Perlow,* 375 F. 2d 393 (2d Cir., 1967). Heeding the caution of *Bankers Life* that § 10(b) be viewed "flexibly, not technically and restrictively", 404 U. S. at 12, this Court deems the defendant's alleged nondisclosure as trustee or agent viz-a-viz the plaintiff as beneficiaries and principals, to fall within the ambit of Federal securities law.

The fraud alleged in *Bankers Life* did not run between purchaser and seller. The rule that this is a requirement of 10b-5

actions, as stated in *Rippey* v. *Denver United States National Bank*, 260 F. Supp. 704, 715 (D. Colo., 1966), cannot any longer be considered to be the law. In *Bankers Life*, both the purchaser and seller of the corporation's stock practiced fraud on the corporation. In permitting the suit, the Supreme Court stated:

> ". . . disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web" along with manipulation, investor's ignorance and the like.
>
> 404 U. S. at 12, citing H. R. Rep. No. 1383, 73d Cong., 2d Sess., 6

In other contexts, the courts have allowed 10b-5 suits though the fraud did not run from purchaser to seller. In *A. T. Brod & Co.* v. *Perlow, supra*, the fraud ran from a purchaser to his broker, and in *Opper* v. *Hancock Securities Corp.*, 467 F. 2d 157 (2d Cir., 1966) and *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N. D. Ill., 1967), the fraud ran from the broker to his client. See also, *Kasner* v. *H. Hentz & Co.*, ¶ 93,819 CCH FED. SEC. L. REP. (5th Cir., 1973). In the corporate setting, derivative suits have been allowed under 10b-5 for fraud perpetrated upon a corporation by its directors. *Ruckle* v. *Roto American Corp.*, 339 F. 2d 24 (2d Cir., 1964); *Schoenbaum* v. *Firstbrook*, 405 F. 2d 200, reviewed en banc, 405 F. 2d 215 (2d Cir., 1968), *cert. denied*, sub. nom., *Manley* v. *Schoenbaum*, 395 U. S. 906 (1969). In the *Ruckle* case, the Court noted:

> "There can be no more effective way to emasculate the policies of the Federal securities laws than to deny relief solely because a fraud was committed by a director rather than an outsider."

Two additional cases which militate for the maintenance of the instant suits in the Federal Courts are *Heyman* v. *Heyman*, 356 F. Supp. 958 (S. D. N. Y., 1973) and *James V. Gerber Products Co.*, 483 F. 2d 944 (6th Cir., 1973), in which the courts

found that the plaintiffs as beneficiaries of trusts had standing to sue their trustees under Rule 10b-5. The defendant Bank endeavors to distinguish the latter case by noting that the trustee and the purchaser of stock were intertwined through an interlocking directorate, whereas the fraud alleged in the instant case is unilateral. We do not feel this is a cogent distinction. On the contrary, the facts in the *James* case seem quite analogous to those in the instant suit. Both involve what are essentially fiduciary breaches and the corporate entanglement in *James* is rather similar to the complex commercial involvement the Bank is alleged herein to have had. Therefore, there may be Federal securities fraud regardless of whether the means to accomplish it is unilateral or involves a third-party buyer or seller.

The second major argument advanced by the defendant is that the Federal regulatory scheme governing banks, vests in the Comptroller of the Currency, under the National Banking Act, 12 U. S. C. § 1, et seq., rather than the Securities and Exchange Commission, authority to regulate national banks in the performance of their banking functions. Defendant reasons, therefore, that the "conflicts" alleged in these cases are within the exclusive jurisdiction of the Comptroller.

The Securities Act of 1933 expressly exempts from registration:

> ". . . any security issued or guaranteed by any bank; * * * or any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee * * *."
>
> 15 U. S. C. § 77c

The Securities Exchange Act of 1934 exempts from its registration requirements:

> ". . . any interest or participation in any collective trust funds maintained by a bank * * * which interest or participation is issued in accordance with (i) a stock-bonus, pension, or profit-sharing plan which meets the

requirements for qualification under Section 401 of Title 26 * * *."

15 U. S. C. § 781

The 1934 Act further provides:

"In respect of any securities issued by banks the deposits of which are insured in accordance with the Federal Deposit Insurance Act, the powers, functions and duties vested in the Commission under this chapter to administer and enforce Section 781 (registration), 78m (reports), 78n(a) and (c) (proxies), 78n(d) and (f) (tender offers) and 78p (insider trading) of this title with respect to national banks * * * are vested in the Comptroller of the Currency * * *."

15 U. S. C. § 781(i)

This Court held in *Brackett* v. *Vose*, No. 72 C 2843, (N. D. Ill., Nov. 27, 1973), that the former two provisions exempt interests in non-business trusts from registration, but do not concomitantly free the trustees dealing on behalf of those trusts from the scope of the anti-fraud provisions of the 1933 and 1934 Acts. Also illuminating are the decisions in *Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville*, 409 F. 2d 989 (4th Cir., 1969) and *Carrol* v. *First National Bank of Lincolnwood*, 413 F. 2d 353, 358 (7th Cir., 1969), which held national banks liable under the Federal securities law. In *Lehigh*, the Court noted:

"[t]he fact that Congress exempted from the registration requirements of the Securities Act of 1933 the securities of any 'banking institution * * * the business of which is substantially confined to banking and is supervised by the State * * * banking commission * * *' (15 U. S. C. § 17(a)(2), indicates that Congress was aware of the peculiar problems and strengths of banks resulting from their regulation by state and Federal banking statutes. *That Congress made no express general exemption for banks under the fraud provisions of either the Securities Act of 1933 or the Securities Exchange Act of 1934 indicates that Congress did not intend any such exemption.*" (emphasis added)

Furthermore, in *Affiliated Ute Citizens* v. *U. S.*, 406 U. S. 128 (1972), the Supreme Court expressly held a national bank liable under 10b-5.

Additionally, the defendant attempts to infer an exemption from the broad reaches of the Federal securities law for national banks when acting as trustees, by virtue of the delegation to the Comptroller of extensive authority to regulate the trust activities of the national banks, with particular reference to potential conflicts of interest which may arise during the conduct of its fiduciary duties. Pursuant to that authority, the Comptroller has adopted the following regulation to eliminate such conflicts:

> "Self Dealing . . .[F]unds held by a national bank as fiduciary shall not be invested in stock or obligations of or property acquired from, the bank or its directors, officers or employees, or individuals with whom there exists such a connection, *or organizations in which there exists such an interest as might affect the exercise of the best judgment* of the bank in acquiring the property. . . ." (emphasis added)

12 C. F. R. 9.12

Through the Financial Institutions Supervisory Act of 1966, 12 U. S. C. § 1818, Congress gave the Comptroller the added power to formally adjudicate any violations of its regulations. However, the Court in *Blaney* v. *Florida National Bank at Orlando*, 357 F. 2d 27 (5th Cir., 1966), seriously questioned whether the national trust regulations were motivated by the broad remedial purposes underlying the Securities Exchange Act and noted that instead:

> ". . . they were primarily designed, rather, to place national banks on an equal competitive basis with state banks and trust companies in the state where the national bank is situated."

357 F. 2d at 30.

Therefore just as Section 12(i) of the 1934 Act, 15 U. S. C. § 781(i) while vesting in the Comptroller authority over various

aspects of the issuance of securities by certain banks does not free the transactions in these securities from the anti-fraud provisions, national banks when acting as trustees are equally subject to such liability.

The defendant also cites *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289 (1973) and *Chicago Mercantile Exchange* v. *Deaktor*, ... U. S. ....., 38 L. Ed. 2d 344 (1973), for the proposition that the Comptroller has exclusive authority over bank conflicts of interest. A reading of the opinions in these cases, however, discloses that they deal with the concept of "primary jurisdiction." The defendant has conceded that this doctrine is inapplicable to the 10b-5 claims. We agree. A predicate to application of the doctrine of primary jurisdiction is an inherent incompatibility between two regulatory schemes. Regulation by one Federal agency does not automatically immunize an industry from regulation by another Federal agency; nor are concurrent state and Federal regulation of an industry mutually repugnant. *Tcherepnin* v. *Knight*, 389 U. S. (1967); *SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1969); *California* v. *Federal Power Comm.*, 369 U. S. 482, 489 (1962). Under scrutiny in *Ricci, supra*, was the Commodities Exchange Act, 7 U. S. C. § 1 et seq., which by its very nature has certain anti-competitive aspects. Thus, there was the necessary "incompatibility" between that Act and the anti-trust laws. Such an "incompatibility" does not exist between the securities laws and the national banking laws. Repeal of the securities laws is not "necessary to make the [National Banking Act] work. . . ." *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963); *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. at 301. But even if there were an "incompatibility" between the two, it is axiomatic that the Court must first attempt to reconcile the operations of the coexisting schemes rather than to hold one is completely ousted of jurisdiction. *Silver* v. *New York Stock Exchange*, 373 U. S. at 357-58; *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 268 (7th Cir.,

1970). Finally, even if the doctrine of primary jurisdiction were applicable to these facts, the solution to the problem would not be for the Court to order dismissal, but instead to stay the proceedings "until the administrative officials have had an opportunity to act." *Ricci* v. *Chicago Mercantile Exchange, supra; Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213 (1966).

Besides the failure to disclose information regarding the financial condition of the issuers and the defendant's alleged conflict of interest, the various counts in Cause No. 73 C 772 also assert a failure to disclose violation of the Comptroller's Regulation 12 C. F. R. 9.12. In *Blaney, supra,* the Court expressly held that the national trust regulations were not designed to create a private civil remedy. The plaintiffs cannot circumvent this holding by grafting an alleged violation of the trust regulations onto a 10b-5 failure to disclose allegation and expect to recover on that basis. The 10b-5 fraud must stand or fall on its own, irrespective of a concurrent violation of the banking regulations. Therefore, to the extent Cause No. 73 C 772 attemps to state a claim for relief on the basis of 12 C. F. R. 9.12, it must be dismissed.

The defendant's third major argument asserts that Counts II and III in Causes 72 C 2551, 72 C 2935, 73 C 46, and 73 C 660 merely allege negligence, imprudence, want of due care, and nonsuitability and as such fail to allege a sufficient § 10(b) claim. The cases indicate that § 10b-5 contemplates something more than mere negligence, imprudence or error in judgment. See *Mercury Investment Co.* v. *A. G. Edwards & Sons,* 295 F. Supp. 1160 (S. D. Tex., 1969): *Hecht* v. *Harris, Upham & Co.,* 283 F. Supp. 417 (N. D. Cal., 1968); *Colonial Realty Corp.* v. *Bache & Co.,* 358 F. Supp. 178 (2d Cir., 1966). However, the thrust of these counts is not that defendant was imprudent in selecting these investments, but that it concealed material information in so doing, namely, that the issuer of the securities had insufficient cash, substantial and accelerating

operating losses, debt service requirements in excess of cash generated, and inflated market price. Each count alleged that defendant "knew or should have known" the facts concealed. This is all that the rule requires, as was held in *Heit* v. *Weitzen*, 402 F. 2d 909, 914 (2d Cir., 1968):

> ". . . we pass only upon the legal sufficiency of the complaints to allege a claim for relief. This each of the complaints fairly does. The charge that defendants 'knew or should have known' adequately alleges actual knowledge of the falsity of the statements, and alternatively, negligence or lack of diligence in failing to ascertain the true facts. If some form of scienter test is to be applied, as Judge Friendly seems to suggest in his concurring opinion in *Texas Gulf Sulphur*, we think the alternative allegation of actual knowledge of falsity is amply sufficient as a matter of pleading. And this would seem to be so whether the scienter test ultimately applied be strict or liberal. . . ."

In any case, the Federal Rules of Civil Procedure merely require "a short and plain statement of the claim." Rule 8, F. R. C. P. Thus, as long as the defendant is given notice of the nature of the claim, the complaint cannot be dismissed, specifically and exactitude of pleading are no longer required. See *Conley* v. *Gibson*, 355 U. S. 41 (1957). Secondly, any inferences drawn must be favorable to the plaintiff. *United Milk Products Co.* v. *Michigan Ave. National Bank of Chicago*, 401 F. 2d 14, 17 (7th Cir., 1968). The two counts in question should not be dismissed at this time.

Therefore, for the above reasons, these plaintiffs may bring this action against the defendant as trustee and investment agent for violation of Rule 10b-5; and the defendant's several motions to dismiss the 10b-5 claims in the cases captioned above are denied, except to the limited extent granted above in Cause No. 73 C 660.

III.

Motion to Dismiss Counts V and VIII of Cause No. 73 C 660

The defendant argues that the state law Counts V and VIII in Cause No. 73 C 660 in essence assert "intra-bank" conflicts of interest and, as such, are subject to the "exclusive primary" jurisdiction of the Comptroller of the Currency. The arguments made in support of this motion to dismiss are basically indistinguishable from those previously advanced regarding "exclusive" jurisdiction as to the Federal claims. Thus we adopt the reasons for denying that portion of the motion and conclude that the doctrine of "primary jurisdiction" is equally inapposite to these counts. This position is reinforced by a perusal of 12 U. S. C. § 92a, which makes the right of national banks to act as trustees and in other fiduciary capacities turn upon the law of the state in which the national bank is located. Thus a national bank, when acting as trustee, cannot escape the purview of the state law of trusts and contracts. For these reasons, defendant's motion to dismiss Counts V and VII is denied.

IV.

Motion to Dismiss the Alleged Violations of § 17a of the Securities Act of 1933 in Cause No. 73 C 772

Counts I, III and V of the Air Line Pilots' complaint allege violations of § 17(a) of the Securities Act of 1933, in addition to the violation of § 10b and Rule 10b-5 of the 1934 Act. The defendant has moved to dismiss these counts for the same reasons advanced as to the § 10(b) claims, but also on the basis that § 17(a) does not create a private right of action for damages.

Section 17(a) of the Act provides:

> (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instru-

ments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

This provision is clearly criminal in nature and does not explicitly provide a civil remedy. Any private right of action under this section can only be implied through application of "the general principle of tort law that violation of a provision of a criminal statute can, unless expressly or impliedly negatived by the statute itself, give rise to a civil remedy in tort." *Trussell* v. *United Underwriters, Ltd.*, 228 F. Supp. 757, 765 (D. Colo., 1964); cf. Restatement, Second, Torts, § 286. Various courts have expressly recognized the existence of such a remedy, while others have simply assumed, without actually deciding the question, that a private cause of action is present under § 17(a). See, *Globus* v. *Law Research Service, Inc.*, 418 F. 2d 1276, 1283 (2d Cir., 1969), *cert. denied*, 397 U. S. 913 (1970); *Dyer v. Eastern Trust and Banking Co.*, 336 F. Supp. 890, 903 (D. Me., 1971); *Dorfman* v. *First Boston Corp.*, 336 F. Supp. 1089 (E. D. Penn., 1972). This position has not met with complete jural concurrence; some courts have denied this private civil remedy. See, *Dyer* v. *Eastern Trust and Banking Co.*, 336 F. Supp. at 904; 6 Loss, Securities Regulation 3912 (1969). In the Seventh Circuit, the question does not appear to have been completely resolved, see, *Surowitz* v. *Hilton Hotels Corp.*, 342 F. 2d 596, 604 (7th Cir., 1965), although one district court has

twice flatly held that this private action is available. *Freed* v. *Szabo Food Service, Inc.*, CCH Fed. Sec. L. Rep. § 91,317 (N. D. Ill., 1964); *Schaefer* v. *First National Bank of Lincolnwood*, 326 F. Supp. 1186, 1190 (N. D. Ill., 1970). Even though the preponderance of authority seems to weigh heavily in favor of permitting a private remedy under § 17(a), it is unnecessary for the Court to resolve this conflict for the purposes of the present suit. In this opinion, we have previously allowed the § 10(b) claims to stand. Thus, the better approach is that taken by the *Globus* court when it adopted the view set forth by Judge Friendly, in his concurring opinion in *S. E. C.* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 864 (2d Cir., 1968): there seems to be little practical value in denying the existence of a private action under § 17 once it is established that a plaintiff has an action under § 10(b) of the 1934 Act. Therefore, the Air Line Pilots may assert a private remedy under § 17(a).

There is a motion filed with this Court to dismiss Counts IX through XIII in Cause No. 73 C 772 for lack of pendent or diversity jurisdiction. Since this Court has previously decided that a valid 10(b) claim exists in the prior counts of this cause, there is pendent jurisdiction for the related state law claims. Thus, the defendant's motion to dismiss these counts must be denied.

In summation, the motions to dismiss the 10b-5 claims in Cause Nos. 72 C 2551, 72 C 2935, 73 C 46 and 73 C 772 are denied; the motion to dismiss the 10b-5 claims in No. 73 C 660 are granted in part and denied in part; the motion to dismiss Counts V and VIII in Cause No. 73 C 660 is denied; the motion to dismiss the alleged violations of § 17(a) of the 1933 Act in Counts I, III and V of Cause No. 73 C 772 is denied; the motion to dismiss Counts IX through XIII in Cause No. 73 C 772 is denied; the motion to consolidate the various causes is granted for purposes of discovery only. The motion to dismiss as to CIIT in Cause No. 73 C 46 is stayed, pending further briefing.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-626

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Petitioner,

vs.

HAROLD G. O'BRIEN, ET AL.,
Respondents,

and

RELATED CASES

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JAMES S. GORDON
EDWARD SLOVICK
Suite 4501—One IBM Plaza
Chicago, Illinois 60611

A. BRADLEY EBEN
230 West Monroe Street
Chicago, Illinois 60606

RICHARD F. WATT
RUSSELL WOODY
Suite 4750—One IBM Plaza
Chicago, Illinois 60611
Attorneys for Respondents

INDEX

PAGE

Opinions Below 1

Question Presented 2

Statement of the Case 3

Reasons for Denying the Writ 7

Conclusion 16

Appendix A1

TABLE OF AUTHORITIES

Cases Cited

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 6

American Airlines, Inc. v. Forman, 204 F.2d 230 (3d Cir. 1953) 9, 11, 13, 14

CAB v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974) 13, 14, 15

Carroll v. First National Bank of Lincolnwood, 413 F.2d 353 (7th Cir. 1969) 6

Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113, 38 L.Ed. 2d 344 (1973) 6

Cobbledick v. United States, 309 U.S. 323 (1940) 8

Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) 7, 8, 9, 10, 11, 12, 14, 15

Drexler v. Southwest Dubois School Corp., ... F.2d ....., No. 72-1918 (7th Cir. Oct. 15, 1974) 15

Eisen v. Carlisle & Jacquelin, ... U.S. ..... 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974) 7, 9, 11, 14

Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 9, 10

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) 15

Irvine v. California, 347 U.S. 128 (1954) 6

James v. Gerber Products Co., 483 F.2d 944 (6th Cir. 1973) 6

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 15

Leheigh Valley Trust Co. v. Central National Bank of Jacksonville, 409 F.2d 989 (5th Cir. 1969) 6

Local 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963) 7, 12, 13

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 13

Northern Securities Co. v. United States, 193 U.S. 197 (1904) 4

Parr v. United States, 351 U.S. 513 (1956) 8

Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) 6

Sears Roebuck and Co. v. Mackey, 351 U.S. 427 (1956) 8

SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) 12

Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) 6

Swift & Co. v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950) 8, 9, 11, 14

Thill Securities Corp. v. New York Stock Exchange, 469 F.2d 14 (7th Cir. 1972) 9, 11, 13, 14, 15

United States v. Wood, 295 F.2d 772 (5th Cir. 1961) ... 8

Statutes Cited

15 U.S.C. § 78j(b) 3
15 U.S.C. § 77g(a) 3
28 U.S.C. § 1257 .....12, 13
28 U.S.C. § 1291 .....2, 13
28 U.S.C. § 1292(b) 5, 11
28 U.S.C. § F.R.A.P. Rule 35(a), (b) 2

Treatises and Articles

9 Moore, *Fed. Prac.* ¶ 110.10, pp. 136-37 (2 ed. 1973) .. 13
Note, *Appealability in the Federal Courts*, 75 *Harv. L.Rev.* 351 (1961) 8

Administrative Provision Cited

17 C.F.R. 240.10b-5 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-626

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, OF CHICAGO,

Petitioner,

vs.

HAROLD G. O'BRIEN, ET AL.,

Respondents,

and

RELATED CASES

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents pray that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The unpublished order of the Court of Appeals for the Seventh Circuit of which review is sought is reproduced at page A1 of Petitioner's Appendix. The unpublished order of the Court of Appeals denying a petition for rehearing with suggestion for rehearing *en banc* is reproduced at page A25 of

Respondents' Appendix.[1] The order of the district court denying petitioner's motion to dismiss these six cases, reported at CCH Fed.Sec.L.Rep. ¶ 94,565 (May 10, 1974), is reproduced at page A2 of Petitioner's Appendix. The unpublished order of the district court (July 8, 1974) denying petitioner's motion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is reproduced at page A26 of Respondents' Appendix.

QUESTION PRESENTED

Whether, in a private action for damages against a national bank under the antifraud provisions of the federal securities laws, an order denying a motion for reference of but one of multiple claims to the Comptroller of the Currency under the doctrine of primary jurisdiction is appealable under 28 U.S.C. § 1291.[2]

1. The denial of the petition and suggestion for rehearing *en banc* indicates that six of the seven circuit judges (Judge Cummings not sitting) in active service in the Seventh Circuit did not consider the proceedings below as involving a question of exceptional importance or that consideration by the full court of the question involved was necessary to secure or maintain uniformity of its decisions. See F.R.A.P. Rule 35(a), (b), 28 U.S.C.A.

2. The logical extension of this question involves the appealability *as a matter of right* of every order denying reference to a regulatory agency sought under the doctrine of primary jurisdiction. If petitioner's position that every such order is appealable as of right is sustained, the impact on courts of appeals, already burdened with overcrowded dockets, would be overwhelming. Given the myriad federal agencies, one or more of which has some form of regulatory jurisdiction over at least one area of interstate commerce, piecemeal appeals would tax the appellate process beyond its present limits.

STATEMENT OF THE CASE

These six cases all are brought in part under the antifraud provisions of the federal securities laws.[3]

Plaintiffs in each of these cases are, with few exceptions, trustees of employee benefit plans, including pension funds.[4]

The operative facts alleged in each of the complaints are substantially identical. In each of these cases the plaintiffs appointed defendant bank as their fiduciary agent or trustee with discretion to select, purchase, hold and sell securities suitable for trust investment.

In each complaint the bank is charged with investing assets of plaintiffs' fund in securities of an issuer with which defendant bank had, at the same time, a substantial but undisclosed, creditor and "insider" relationship. It is alleged that, in connection with the securities transactions complained of, defendant bank concealed from plaintiffs the material facts respecting its creditor relationship.[5]

3. All of the cases are brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). *O'Donnell* is also brought under § 17a of the Securities Exchange Act of 1933, 15 U.S.C. § 77g(a). Based on the same facts alleged in the statutory counts, all of the complaints also plead common law claims for breach of trust and contract, under the doctrine of pendent jurisdiction.

4. In all cases, plaintiffs are markedly different from the "contingent beneficiaries and remaindermen" alluded to at the end of the footnote at Pet. 5. The true relationship between plaintiffs, as *investors,* and defendant, as *an active money manager,* was aptly recognized by the district court in its decision of May 10, 1974. Pet. App. A9.

5. Petitioner isolates this claim and urges the *in terrorem* argument that, if it is enforced, major banks would be crippled. (Pet. p. 4n**). Such predictions of "disaster to business" are not unfamiliar. Virtually the identical argument was rejected by this Court more than 70 years ago in construing another broad remedial

It is further alleged that defendant bank concealed from plaintiffs the fact that their investments in the subject securities were rendered illiquid because of defendant bank's "insider" position, which inhibited or prohibited its trading in such securities.

Plaintiffs further charge that, because of these concealed conflicts, and notwithstanding defendant's fiduciary duty to liquidate said investments when continued retention became imprudent, defendant delayed and postponed such liquidation in order to favor and protect its own interests over those of plaintiffs.

Plaintiffs further allege that, based on its analysis of the financial condition of the issuer, defendant bank knew but failed to disclose to plaintiffs that the subject securities were not of suitable investment quality for plaintiffs' pension funds, and that defendant concealed such information from plaintiffs from the time the subject securities were purchased to and including the time of sale thereof.[6]

Petitioner moved to dismiss these cases on the grounds, among others, that (a) the complaints failed to state a claim

---

statute. *Northern Securities Co.* v. *United States*, 193 U.S. 197, 351-352 (1904). The same argument, twice advanced below, failed to impress let alone terrify either the district court or the Court of Appeals. In any case, it is totally extraneous to the question of appealability. Assuming *arguendo* that it has any merit at all, the argument should be directed to Congress, not the judiciary. It raises policy questions "which belong to another department." *Id.*

6. Defendant's answer in *Vest* which, pursuant to Rule 9(a) of the General Rules of the District Court, also contains a complete restatement of the allegations in the complaint, is reproduced in Respondents' Appendix at p. A1. The allegations in this complaint are typical of those in all of the cases, differing in substance only with respect to the identity of the securities involved, the dates and amounts of purchases and sales and the loss incurred. See, *e.g.*, the complaints in *O'Brien*, No. 72C 2551, and *O'Donnell*, No. 73C 772, included in the record certified to this Court by the Clerk of the District Court.

upon which relief can be granted; (b) the court lacked jurisdiction over the subject matter; (c) national banks, when acting as trustees, are impliedly exempt from the antifraud provisions of the federal securities laws; and (d) the Comptroller of the Currency had *exclusive* jurisdiction of the claims asserted. The district court rejected these grounds and denied petitioner's motions. (Pet. App. A2) In ruling on the last ground mentioned, the district court stated that it agreed with the petitioner's concession that the doctrine of *primary* jurisdiction was inapplicable to respondents' Rule 10b-5 claims. (Pet. App. 14)

Subsequently, petitioner moved for reconsideration of this order and, for the first time, invoked the doctrine of primary jurisdiction for the purpose of seeking a stay of proceedings pending a reference of one of the issues in these cases to the Comptroller of the Currency.[7] The district court also denied this motion.

Thereafter petitioner first moved to amend the district court's order to permit interlocutory appeal under 28 U.S.C. § 1292(b). After this motion was denied (Resp. App. A25), petitioner nevertheless sought to appeal *as of right* under 28 U.S.C. § 1291 from the district court's aforesaid orders. Petitioner's attempt to so appeal was rejected by the court below on the ground that the orders appealed from were "not final or otherwise appealable." (Pet. App. A1)

The court below did not consider or decide the correctness of the orders from which appeal was sought, notwithstanding

7. Petitioner's position in this Court, as it was below, is that the sole claim it seeks to have referred to the Comptroller is its alleged conflict of interest arising out of its creditor relationship with an issuer whose equity securities it acquired for plaintiffs' accounts. (Pet. p. 4) As noted above, this claim is but one of numerous statutory and common law claims asserted in the complaints; petitioner does not argue here that the doctrine of primary jurisdiction is applicable to any of these other claims.

petitioner's efforts to persuade the court to consider the merits of the orders appealed from along with the question of their appealability.[8]

8. Although the merits of the district court's order denying a reference under the doctrine of primary jurisdiction are not before this Court and argument thereon is questionable (Cf. *Irvine* v. *California*, 347 U.S. 128, 129 (1954)), a considerable portion of the petition is devoted to just such an argument (Pet. 4-6, 7n, 12, 13n). Even so, petitioner's argument is highly dubious. The present cases present no conflict between regulatory statutes, a specific requirement in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). Nor is the Comptroller of the Currency an agency whose functions "appear to encompass adjudication of the kind of substantive claims" made in these cases under the federal securities laws, *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, ..., 38 L.Ed.2d 344, 347 (1973). The notion that the Comptroller should adjudicate claims arising under regulations promulgated by the Securities and Exchange Commission is highly novel. Petitioner's suggestion that enforcement of the antifraud provisions of the federal securities laws is inimical to the conduct of a banking business under the national banking laws totally ignores this Court's consistent application of Section 10(b) of the 1934 Act to national banks in both their commercial and trust department activities without deference to any administrative agency. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). And see *James* v. *Gerber Products Co.* 483 F.2d 944 (6th Cir. 1973); *Leheigh Valley Trust Co.* v. *Central National Bank of Jacksonville*, 409 F.2d 989 (5th Cir. 1969); *Carroll* v. *First National Bank of Lincolnwood*, 413 F.2d 353 (7th Cir. 1969). Certainly if the primary jurisdiction issue were as omnipresent as petitioner urges here, the issue would have been raised by counsel in these cases or by the courts *sua sponte*.

REASONS FOR DENYING THE WRIT

The petition should be denied because: (a) the decision of the Seventh Circuit is not in conflict but is in accord with controlling decisions of this Court; and (b) the decision of the Seventh Circuit is not in conflict but is consonant with other decisions of courts of appeals on the same matter; assuming, *arguendo*, the existence of differences, they are not of such importance as to justify the issuance of the writ sought.

I.

THE RULING BELOW IS IN ACCORD WITH THE CONTROLLING DECISIONS OF THIS COURT

The petition relies primarily on this Court's seminal decision in *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949) and asserts that the ruling of the court below conflicts with *Cohen* and with two later decisions of this Court applying its doctrine, *Eisen* v. *Carlisle and Jacquelin*, ... U.S. ....., 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), and *Local 438 Construction and General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963). There is no such conflict.

A. Cohen Applies Only Where There Is a Showing of Irreparable Injury Because of the Ineffectiveness of Later Review

In *Cohen*, this Court held appealable "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

The petition focuses on but one of *Cohen's* requirements: that the order for which appellate review is sought adjudicate a collateral claim. This emphasis is quite evident in petitioner's statement of the question presented, "whether the district court's refusal to refer or to stay is separate from and collateral to the merits of the cases and *therefore* appealable as a final order under 28 U.S.C. § 1291." (Pet. 3, emphasis added)

Petitioner all but ignores the most essential if not the controlling requirement in *Cohen*: that denial of immediate review would result in irremediable injury in that appellate review at a later date would be an "empty rite." *Swift & Co.* v. *Compania Colombiana Del Caribe,* 339 U.S. 684, 688-689 (1950); *Cohen* v. *Beneficial Loan Corp., supra* at p. 546; *Sears Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 441 (1956).

In discussing this essential aspect of *Cohen,* Mr. Justice Jackson pointedly noted that when the time came to review a final judgment on the merits, "it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." 337 U.S. at 546. The lower courts and leading commentators have considered this irreparable injury feature of the *Cohen* doctrine to be decisive. See *e.g., United States* v. *Wood,* 295 F.2d 772, 777-78 (5th Cir. 1961); Note, *Appealability In The Federal Courts,* 75 *Harv.L.Rev.,* 351, 364 (1961).

Petitioner makes no showing whatsoever that if denied immediate review it will suffer the type of irreparable loss of rights contemplated in the cases upon which it relies. Instead, it claims some vague injury "in terms of wasted judicial resources" and "cost to the parties here involved." (Pet. 13) Avoiding the cost of protracted and potentially unnecessary litigation is not ground for holding an otherwise interlocutory order appealable. *Parr* v. *United States,* 351 U.S. 513, 519-20 (1956); *Cobbledick* v. *United States,* 309 U.S. 323 (1940).[9]

9. There is no case which holds that appeal of right is to be determined solely upon considerations of judicial economy. If so, by *reductio ad absurdum,* the denial of every motion to dismiss would be appealable as of right.

In *Cohen*, denial of immediate review would have compelled the defendant to litigate without the protection of security for costs, and reversal on later appeal would have afforded defendant only the meaningless opportunity to recover its costs against a possibly uncollectible defendant. This would have been as much an "empty rite" as affording the successful plaintiff in *Swift & Co., supra*, the privilege of attempting to attach a ship that had sailed. (339 U.S. at 689) Similarly, in *Eisen* v. *Carlisle and Jacquelin, supra*, denial of immediate review would irreparably injure defendants since they would be required to expend substantial funds for a class notice with a later appeal, if successful, affording them the dubious privilege of attempting to collect those costs from a plaintiff with a mere $70.00 interest in the case. Here, petitioner does not even suggest that, if denied immediate review, it might be unable to recover its proper costs after a successful trial on the merits.

Petitioner's inability to show any irreparable loss of rights quite obviously stems from the fact that the district court's orders can be effectively reviewed after judgment on the merits. Two circuits have specifically so held. *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14, 17 (7th Cir. 1972); *American Airlines, Inc.* v. *Forman*, 204 F.2d 230, 232 (3d Cir. 1953). Of course, should defendant prevail on the merits, the entire primary jurisdiction issue would be mooted, or conceivably it could be raised by defendant in the event of an appeal by plaintiff.

Restating its principal argument that immediate review is necessary to avoid a needless trial, petitioner also urges that "the order appealed from is 'fundamental' to further proceedings in the Court below" (Pet. pp. 12-13), relying on *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148 (1964). This contention derives from a severely truncated description of the complaints, reducing them to but a single statutory claim for concealment of a conflict of interest. (Pet. p. 4) But the complaints also allege many statutory and pendent common law claims

founded on wholly independent facts,[10] none of which claims are asserted by petitioner to be within the primary jurisdiction of the Comptroller, and all of which, concededly, must therefore proceed through discovery, pretrial and trial as in any other lawsuit.

Thus, even if the single conflict of interest claim isolated by petitioner were to be referred to the Comptroller, and even if the Comptroller were to express an opinion so persuasive as to result in its dismissal, the effect on the expense and duration of trial of the remaining claims would be insignificant.[11]

B. Petitioner's Claim of a Right to a Reference to the Comptroller Under the Doctrine of Primary Jurisdiction Is Not Separable from and Collateral to Rights Asserted in These Actions

An additional essential feature of *Cohen* is that the order sought to be appealed must finally determine claims of right *separable from and collateral to* rights asserted in the action. *Cohen* v. *Beneficial Loan Corp., supra,* at 546 (emphasis added). Petitioner would satisfy this requirement with no more than a chain of *ex cathedra* pronouncements. (Pet. 11-12)

The issue of collateralness requires an analysis of the possible effect of an ultimate appeal on a judgment in plaintiffs' favor. The question is whether, after judgment on the merits, a reversal

---

10. See Statement of the Case, p. 4, *supra,* and *Vest* complaint, which is typical, (incorporated in Defendant's Answer, Resp. App. A1, A5, A7-10).

11. For these reasons, *inter alia, Gillespie* is inapposite, and petitioner's predictions of wasted judicial resources and needless expense (Pet. pp. 8, 13) are without merit. In any event, it must be recognized that *Gillespie* was considered by this Court to be an "obviously marginal case", involving a number of unusual circumstances, including the agreement by both the petitioner and respondent that the appeal should be heard as of right. The Court itself seems to have regarded the case as *sui generis* and limited to the peculiar circumstances there present. (379 U.S. at 154)

of the interim order would necessarily leave the judgment untouched. In *Cohen, supra, Swift & Co., supra* or *Eisen, supra,* for example, if plaintiff obtained a judgment on the merits, a subsequent holding by a court of appeals that the disputed interim order was erroneously entered would have no effect on plaintiff's judgment. Conversely, in the present cases, if, on review after judgment on the merits for plaintiffs the Court of Appeals should reverse the order denying reference to the Comptroller, plaintiffs' judgment would in all probability be affected. At the very least, the judgment would be stayed; at most, after reference to the agency, the judgment would be subject to modification or vacation, depending upon what findings or opinions, if any, were expressed by the Comptroller, and the weight which the court thereafter gave them. Cf. *Thill Securities Corp.* v. *New York Stock Exchange, supra,* and *American Airlines, Inc.* v. *Forman, supra.*

Furthermore, it is apparent that the district court's denial of petitioner's motion for reference to the Comptroller was an adjudication not of a collateral issue but of a claim touching upon the merits of plaintiffs' claims. In denying petitioner's motion for certification under 28 U.S.C. § 1292(b) the district judge stated:

> "Implicit in this motion is the contention that if the Comptroller of the Currency were to find that no conflict of interest existed under the national trust regulations, 12 C.F.R. 9.12, a 10b-5 action could not be maintained. As this Court noted in its prior opinion (pp. 18-19, May 10, 1974), such clearly was not the intendment of the trust regulations, see *Blaney* v. *Florida Nat'l Bank at Orlando,* 357 F.2d 27, 30 (5th Cir. 1966). A 10b-5 claim, as well as a common law cause of action for breach of fiduciary duties, will lie regardless of any determination by the Comptroller." (Resp. App., p. A27)

In short, the district court, in a real sense, was ruling on the relevancy of defenses asserted on the merits of respondent's

claims, a ruling which necessarily was a "[step] towards final judgment." *Cohen, supra,* at 546.[12]

Petitioner's reliance on *Local 438 Construction and General Laborer's Union* v. *Curry,* 371 U.S. 542 (1963) is misplaced. In *Curry* the Court was not dealing with a simple question of routing as between two tribunals each having jurisdiction. Rather, the Court was reviewing, in the very special area of state-federal contact, an order by a tribunal totally without power to consider the merits, jurisdiction having been preempted by Congress' adoption of a uniform national labor policy. In that case, the Court granted review of a state court injunction in a labor dispute, despite the argument that, since the injunction was temporary rather than permanent, the order was not "final," within the meaning of 28 U.S.C. § 1257.

In permitting review, the Court emphasized that "postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts" and recognized that "authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the National Labor Relations Board." (371 U.S. at 550) The state court, as this Court found, did not have, and could never have had, jurisdiction. Thus petitioner's *ipse dixit,* that the fact that *Curry* involved *exclusive* rather than *primary* jurisdiction makes no difference (Pet. p. 10), is fallacious; the difference is crucial.

---

12. The correctness of the district court's ruling is amply supported by this Court's decision in *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180 (1963). The existence of the conflict of interest and its potential for abuse are to be judged by the *investor,* not by the court, and certainly not by a federal agency. 375 U.S. at 196. The fiduciary's good faith, lack of intent to injure, the absence of evidence that the judgment of the fiduciary was intrinsically unsound or corrupted by self-interest, and lack of injury in fact are all immaterial. *Id.* at 184-85, 200-01.

The question of finality in *Curry* as well as in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963), also cited by petitioner, was decided under 28 U.S. § 1257. These decisions should not "be regarded as controlling the very different question of what is a 'final decision' under 28 U.S.C. § 1291." 9 Moore, *Fed. Prac.* ¶ 110.10, pp. 136-37 (2d ed. 1973).[13]

II.

THE RULING BELOW HOLDING THAT THE ORDERS APPEALED FROM WERE NOT FINAL OR OTHERWISE APPEALABLE IS CONSONANT WITH THE DECISIONS OF OTHER CIRCUITS

Petitioner argues, as a ground for granting the writ, that it is necessary for this Court to resolve a conflict between the Second and Seventh Circuit Courts of Appeals. This conflict is claimed to exist between the ruling of the court below in the present cases, adhering to its earlier ruling in *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972), on the one hand and the ruling of the Second Circuit in *CAB* v. *Aeromatic Travel Corp.*, 489 F.2d 251 (2nd Cir. 1974) on the other. In both the present cases and in *Thill*, a district court order denying a motion for reference to an agency sought on the ground of primary jurisdiction was held to be not a final order and therefore not appealable. The Third Circuit's holding in *American Airlines, Inc.* v. *Forman*, 204 F.2d

13. Professor Moore's explanation is worth noting:

> "In construing § 1257, the Court is confronted with a very rigid requirement of finality untempered by the many devices for interlocutory review available in the federal system. The same considerations that led to the creation of those devices support a very liberal interpretation of 'final' as the term is used in § 1257, but the availability of the devices in the federal system makes an identically liberal interpretation of 'final' as the term is used in § 1291 both unnecessary and undesirable."

Otherwise, *Curry* and *Langdeau* would stand for the proposition that every order denying a motion to dismiss for lack of jurisdiction would be final and appealable under 28 U.S.C. § 1291.

230 (3rd Cir. 1953) is in accord. Both *Thill* and *American Airlines* held that effective review of the disputed order was available on appeal after final judgment. (*Thill, supra* at 17; *American Airlines, Inc., supra,* at 232)

Aeromatic Travel was an action brought by the Civil Aeronautics Board seeking immediate injunctive relief to enjoin defendant from further violation of that agency's regulations. On defendant's motion the district court stayed the proceedings and referred the case to the agency, *which was itself the plaintiff,* on the ground of primary jurisdiction.

The effect of the entry of this order was to permit the allegedly unlawful conduct of the defendant to continue while administrative proceedings were conducted. In concluding that later review would be ineffective, the Second Circuit noted that Congress provided for direct enforcement of the Federal Aviation Act and the Board's regulations by suit in the district court for the "obvious purpose" of assuring "speedy enforcement of the Act." The two-year delay resulting from the district court's order "clearly thwarted this [Congressional] purpose." 489 F.2d at 254.

In contrast, had the district court there *denied* the motion for referral to the agency, that order, like the order in the present cases, would not have been appealable, for "in such a situation the rights of all the parties can be adequately protected while the litigation on the main claim proceeds." *Swift & Co., supra,* at 689.

Considering the criteria of *Cohen, Swift* and *Eisen,* requiring irremediable injury and ineffectiveness of later review, there is no conflict between the Second Circuit's opinion in *Aeromatic Travel* on the one hand, and *Thill, American Airlines* and the present cases on the other.

However, by focusing solely upon the Second Circuit's statement that the district court's order was *collateral,* petitioner would create a conflict on this ground alone. But even if

Aeromatic is correct and *Thill* is incorrect on the "collateral" question, both opinions nevertheless correctly apply the *Cohen* doctrine. The Seventh Circuit's presumed departure from *Cohen*, holding that the disputed order did not decide a collateral question, becomes immaterial in view of its correct conclusion with respect to the effectiveness of later review after judgment on the merits. Thus the conflict, immaterial as it was to the ultimate decision in *Thill*, would not be so "real and embarrassing" as would warrant granting the writ. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).[14]

14. Petitioner also criticizes the court below for inconsistency in its basic approach to the questions here involved, citing *Drexler* v. *Southwest Dubois School Corp.*, ... F.2d ....., No. 72-1918 (Oct. 15, 1974), (Pet. p. 8n). *Drexler*, however, is not based on *Cohen*. It involved the doctrine of federal abstension, and the Seventh Circuit's holding there was expressly based on this Court's decision in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715n.2 (1962), recognizing the appealability of lower court abstention orders: upon entry of such on order "appellant is effectively out of court." (*Id.*) Petitioner's criticism is unwarranted.

CONCLUSION

This Court should deny the petition for certiorari in these cases because the decision of the Seventh Circuit below is in conformity with the controlling decisions of this Court, and because there is no conflict between the decision below and those of other circuits.

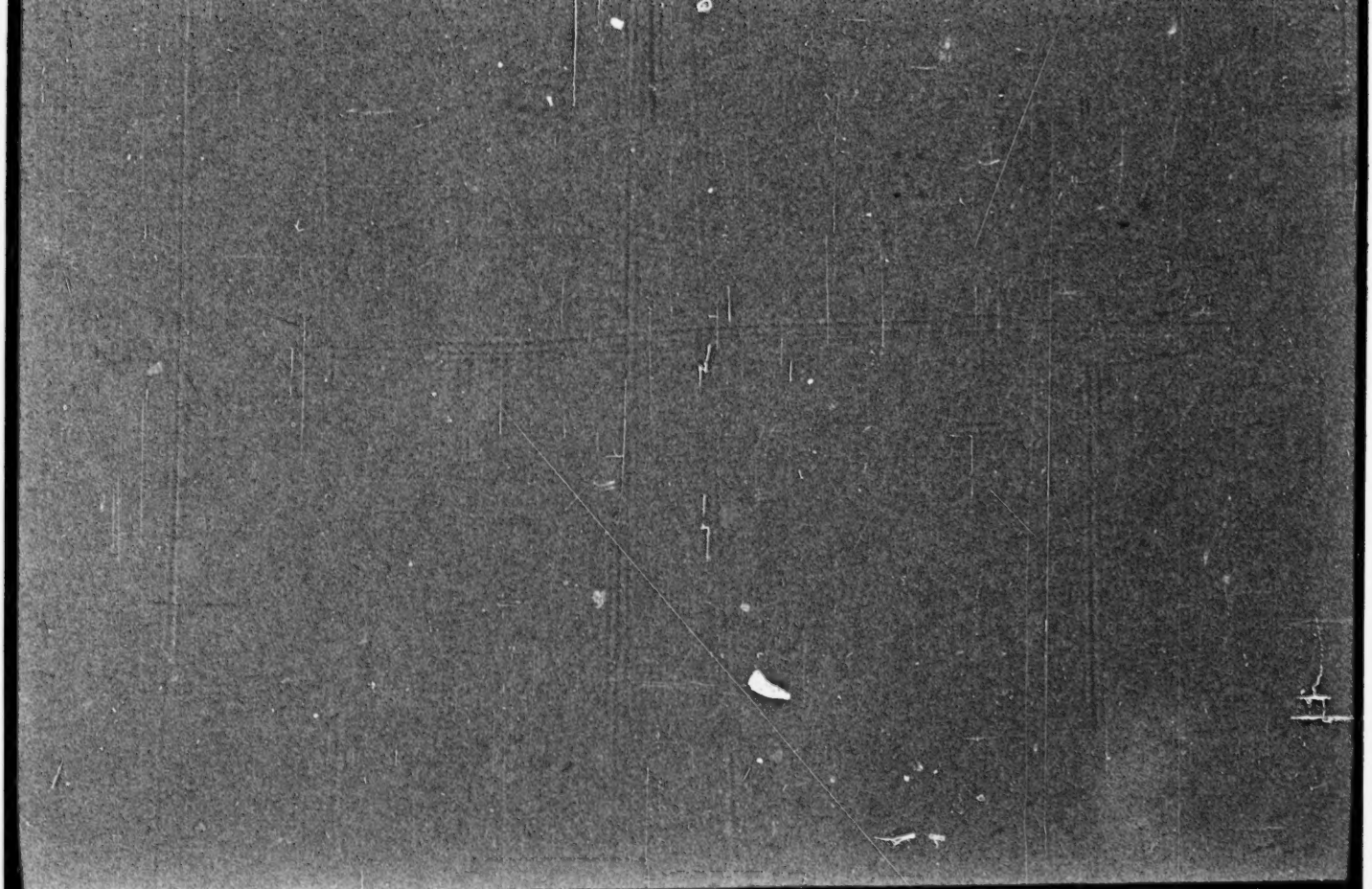
Respectfully submitted,

JAMES S. GORDON
EDWARD SLOVICK
Suite 4501—One IBM Plaza
Chicago, Illinois 60611

A. BRADLEY EBEN
230 West Monroe Street
Chicago, Illinois 60606

RICHARD F. WATT
RUSSELL WOODY
Suite 4750—One IBM Plaza
Chicago, Illinois 60611
Attorneys for Respondents

Appendix



APPENDIX

George Vest, Jr., Charles A. Thompson, Milton Holzman, Richard S. Pepper, Jack H. Paschen, and Herbert S. Church, Jr. as Trustees of the Chicago District Council of Carpenters Pension Fund v. Continental Illinois National Bank and Trust Company of Chicago, a National Banking Association.

United States District Court, Northern District of Illinois, Eastern Division. No. 72 C 2935.

ANSWER

Now comes Defendant, Continental Illinois National Bank and Trust Company of Chicago, a National Banking Association, (hereinafter referred to as Continental Bank), by its attorneys, Miles G. Seeley and Bryson P. Burnham, and in answer to Plaintiffs' Amended Complaint, alleges and states as follows:

COUNT I

1. Paragraph 1 of Count I of the Amended Complaint reads:

> "1. This action is brought under Section 10(b) of the Securities Exchange Act of 1934 (15 USC 78j) and Rule 10b-5 thereunder. This Court has jurisdiction of this action under Section 27 of said Act (15 USC 78 aa)."

1. Continental Bank admits that this action purports to be brought under the statute and rule referred to, but denies that Plaintiff has any cause of action thereunder. Continental Bank admits that if this action were properly brought under said statute and rule, this Court would have jurisdiction under the statute referred to in the last sentence of paragraph 1 of Count I of the Amended Complaint.

2. Paragraph 2 of Count I of the Amended Complaint reads:

> "2. Plaintiffs George Vest, Jr., Charles A. Thompson, Milton Holzman, Richard S. Pepper, Jack H. Paschen and Herbert S. Church, Jr. (hereinafter referred to as 'Plaintiffs' or 'Trustees') are the Trustees of the Chicago District Council of Carpenters Pension Fund, a trust organized under the laws of the State of Illinois for the benefit of carpenters employed in the Greater Chicago area."

2. Continental Bank is informed and believes that the allegations contained in paragraph 2 of Count I of the Amended Complaint are true.

3. Paragraph 3 of Count I of the Amended Complaint reads:

> "3. Defendant Continental Illinois National Bank and Trust Company of Chicago ('Continental') is a national banking association with its principal place of business in Chicago, Illinois."

3. Continental Bank admits the allegations contained in paragraph 3 of Count I of the Amended Complaint.

4. Paragraph 4 of Count I of the Amended Complaint reads:

> "4. At all times material herein there was in force and effect an agreement between the Trustees of the Carpenters Pension Fund and Continental pursuant to which Continental was appointed and agreed to act as agent for the Trustees with respect to investment of funds deposited by them with Continental. Under said agreement the Trustees authorized Continental, in the latter's discretion, to select and purchase securities out of said deposited funds. At all times material herein Continental, pursuant to said contract, had a fiduciary duty to the Trustees to exercise such discretion with prudence and with due regard for the safety of the capital of the Carpenters Pension Fund."

4. Continental Bank admits that there was, at all times material herein, an agreement between it and the Trustees of

the Chicago District Council of Carpenters Pension Fund (hereinafter referred to as Carpenters) pursuant to which Continental Bank was appointed to act as "Agent" for Carpenters with respect to investment of funds deposited by Carpenters with Continental Bank. Continental Bank admits that under said agreement, Continental Bank had discretion within certain written guidelines to select and purchase securities out of said deposited funds. Continental Bank admits that the relationship between it and the Trustees of Carpenters was in part fiduciary in nature but denies that the allegations of paragraph 4 of Count I of the Amended Complaint accurately characterize the standard for the investment of funds as set forth in the agreement between the parties thereto.

5. Paragraph 5 of Count I of the Amended Complaint reads:

> "5. Between August 19, 1966 and November 16, 1966, pursuant to the authority granted it by the Trustees under the aforesaid agency agreement, Continental purchased a total of 6,000 shares of Management Assistance, Inc. ('MAI') common stock for the account of the Carpenters Pension Fund for a total price of $147,050. At the time of such purchases, MAI was principally engaged in the purchase and leaseback of used computers and other data processing equipment. The price-earnings multiple for the shares purchased was approximately 50."

5. Continental Bank admits the allegations contained in paragraph 5 of Count I of the Amended Complaint, except that it states that the total price of the 6,000 shares of MAI stock was $148,250 and that the price-earnings multiple for the shares purchased was approximately 42.

6. Paragraph 6 of Count I of the Amended Complaint reads:

> "6. At all times material herein the common stock of MAI was traded in the over-the-counter market. The aforesaid purchases of MAI common stock were effected through the use of the United States mails and through instrumentalities of interstate commerce."

6. Continental Bank admits the allegations of paragraph 6 of Count I of the Amended Complaint.

7. Paragraph 7 of Count I of the Amended Complaint reads:

> "7. At the time of each of the aforesaid securities purchases by Continental, said bank was the principal creditor of MAI, having loaned or agreed to loan to MAI or to one or more of its subsidiaries the sum of $65,000,000. At said time substantially all of the computers and other data processing equipment then owned by MAI was pledged to Continental to secure said indebtedness, and, in addition, to further secure such indebtedness, Continental had obtained the right to control MAI's future dividend payments and future borrowing rights."

7. Continental Bank denies the allegations of paragraph 7 of Count I of the Amended Complaint, except that Continental Bank states that MAI's dividend policy was restricted in that its loan agreement with Continental Bank provided that MAI would pay no dividends if, after giving effect to such a transaction, the outstanding indebtedness (excluding subordinated debt) of MAI would exceed 350% of MAI's consolidated net worth. Continental Bank further states that it agreed to assume the lead role among a group of participating banks and that said group agreed to loan MAI $65,000,000, and MAI pledged certain computers and data processing equipment to that group of participating banks, including Continental Bank, to secure said indebtedness.

8. Paragraph 8 of Count I of the Amended Complaint reads:

> "8. At said time Continental had, or had available to it, detailed inside information, with respect to the financial condition of MAI and its subsidiaries, including but not limited to, operating statements, balance sheets, cash flow schedules, and other information not then available to the investing public."

8. Continental Bank denies the allegations of paragraph 8 of Count I of the Amended Complaint, except it admits that

as a senior secured creditor of MAI it received certain MAI financial information more detailed than that available to the investing public, but it denies that those officers responsible for making investment decisions with respect to plaintiffs' funds had, or had available to them, such information for their use in making such decisions.

9. Paragraph 9 of Count I of the Amended Complaint reads:

> "9. At the time of said purchases Continental failed to disclose to Plaintiffs that it had a conflict of interest with Plaintiffs with a potential for abuse arising from the fact that Continental was then the principal creditor of the issuer of the aforesaid securities, and controlled the issuer's dividend payment and borrowing policies."

9. Continental Bank denies the allegations of paragraph 9 of Count I of the Amended Complaint, further denies that it had a conflict of interest as alleged, and therefore denies that it should have "disclosed" such matter to Plaintiffs.

10. Paragraph 10 of Count I of the Amended Complaint reads:

> "10. At the time of said purchases, Continental failed to disclose to Plaintiffs that it had and would continue to acquire inside information about MAI's affairs; that as an 'insider' it was or might be inhibited by law from trading in MAI stock; and that this inhibition was or might be in conflict with its aforesaid fiduciary duty to plaintiffs, with respect to its investment in MAI stock."

10. Continental Bank denies the allegations of paragraph 10 of Count I of the Amended Complaint, and therefore denies that it should have "disclosed" any of such matters to Plaintiff.

11. Paragraph 11 of Count I of the Amended Complaint reads:

> "11. Relying on Continental as a fiduciary, and having no knowledge of the material information concealed by Continental, as aforesaid, the plaintiff Trustees acquiesced in the investment of assets of the Carpenters Pension Fund by Continental in MAI securities, and continued so to

acquiesce until the sale of said securities. Because of said concealment, the Trustees were induced to continue their relationship with Continental and were induced not to invoke their power to terminate the aforesaid contractual relationship."

11. Continental Bank denies the allegations of paragraph 11 of Count I of the Amended Complaint, except it admits that the Plaintiffs acquiesced in the investment of their funds by Continental Bank in MAI securities, and continued so to acquiesce until the sale of said securities. Continental Bank further states that Carpenters terminated its relationship with Continental Bank on September 9, 1972.

12. Paragraph 12 of Count I of the Amended Complaint reads:

"12. In November and December, 1970, and June, 1971, Continental sold the 6,000 shares of MAI common stock purchased and held by it for the account of the Carpenters Pension Fund for a net consideration of $6,562.50."

12. Continental Bank admits the allegations of paragraph 12 of Count I of the Amended Complaint, and further states that Carpenters had previously received (on or about September 27, 1967) an additional $1,200.00 for a sale of rights to purchase MAI common stock.

13. Paragraph 13 of Count I of the Amended Complaint reads:

"13. As a result of the aforesaid conduct of Continental, Carpenters Pension Fund suffered a loss in the amount of $140,488.50, or approximately 95% of its total investment in MAI stock."

13. Continental Bank denies the allegations of paragraph 13 of Count I of the Amended Complaint.

14. Paragraph 14 of Count I of the Amended Complaint reads:

"14. The plaintiff Trustees had no knowledge of the aforesaid undisclosed material information until sometime

after Continental commenced selling the MAI common stock purchased and held by it for the account of the Carpenters Pension Fund."

14. Continental Bank denies the allegations of paragraph 14 of Count I of the Amended Complaint.

15. Paragraph 15 of Count I of the Amended Complaint reads:

"15. The aforesaid conduct of Continental was a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder."

15. Continental Bank denies the allegations of paragraph 15 of Count I of the Amended Complaint.

COUNT II

1.-6. Paragraphs 1-6 of Count II of the Amended Complaint reads:

"1.-6. Plaintiffs adopt and reallege as if the same were set forth here in full the allegations in paragraphs 1 through 6, both inclusive, of Count I hereof."

1.-6. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 1 through 6, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 1 through 6, both inclusive, of Count II of the Amended Complaint.

7. Paragraph 7 of Count II of the Amended Complaint reads:

"7. At the time of each of the aforesaid securities purchases by Continental, or prior thereto, Continental had, or had available to it, detailed information with respect to the financial condition of MAI including, but not limited to, operating statements, balance sheets, cash flow schedules, and other information which permitted Continental, by reason of the investment analysts employed by or available to it, to make a complete and unbiased analysis of the financial condition of MAI and the investment quality of its securities."

7. Continental Bank denies the allegations of paragraph 7 of Count II of the Amended Complaint, except it admits that as a senior secured creditor of MAI it received certain MAI financial information, but it denies that its officers responsible for making analyses of the financial condition of MAI and of the investment quality of MAI securities with respect to plaintiffs' funds had, or had available to them, such information for their use in making such analyses.

8. Paragraph 8 of Count II of the Amended Complaint reads:

> "8. At the time said securities were purchased by Continental and continuously thereafter, Continental failed to disclose to Plaintiffs the information that the common stock of MAI was not of an investment quality suitable for trust funds. At and during said times Continental knew or should have known but failed to disclose to Plaintiffs that MAI's financial condition was such that the market price of its common stock was inflated in relation to the operating and financial condition of the company and was subject to the risk of substantial decline. In particular, Continental knew but failed to disclose:
>
> (a) That MAI had never paid a dividend on its common stock and that there was no reasonable probability that it would do so in the foreseeable future;
>
> (b) That MAI was principally engaged in purchasing used computer and other data processing equipment from, and leasing it back to, customers on terms which did not permit the company to recover the cost of the leased equipment during the term of the lease;
>
> (c) That the business of MAI was subject to a high risk of loss on each such purchase and leaseback transaction due to the rapid rate of technological obsolescence of the leased equipment; and that, if leased equipment were to become technologically obsolete at or prior to expiration of the leased term, re-rental or liquidation of such obsolete inventory would be subject to high risk of loss; and

(d) That the price at which Continental acquired the MAI stock for Plaintiff's portfolio reflected a price-earnings ratio of approximately 50:1, which price and price/earnings ratio were excessively speculative (in relation to the high degree of risk of MAI's business) for a pension fund portfolio."

8. Continental Bank denies the allegations of paragraph 8 of Count II of the Amended Complaint, except Continental Bank admits that at the time of the purchases in question MAI had never paid a cash dividend.

9. Paragraph 9 of Count II of the Amended Complaint reads:

"9. Relying on the professional expertise of Continental, and having no knowledge of the aforesaid material information, the plaintiff Trustees acquiesced in the investment of assets of the Carpenters Pension Fund by Continental in MAI securities, and continued so to acquiesce until the sale of said securities. Relying on the professional expertise of Continental, Plaintiffs were induced to continue their relationship with Continental and were inducted not to invoke their power to terminate the aforesaid contractual relationship."

9. Continental Bank denies the allegations of paragraph 9 of Count II of the Amended Complaint, except it admits that the Trustees of Carpenters acquiesced in the investment of certain of their funds in MAI securities. Continental Bank further states that Carpenters terminated its relationship with Continental Bank on September 9, 1972.

10.-13. Paragraphs 10-13 of Count II of the Amended Complaint reads:

"10.-13. Plaintiffs adopt and reallege as if the same were set forth here in full the allegations in paragraphs 12 through 15, both inclusive, of Count 1 hereof."

10.-13. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 12 through 15, both inclusive, of Count I of the Amended

Complaint as its answers to paragraphs 10 through 13, both inclusive, of Count II of the Amended Complaint.

COUNT III

1.-6. Paragraphs 1-6 of Count III of the Amended Complaint read:

> "1.-6. Plaintiffs adopt and reallege as if the same were set forth here in full, the allegations of paragraphs 1 through 6, both inclusive, of Count I hereof."

1.-6. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 1 through 6, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 1 through 6, both inclusive, of Count III of the Amended Complaint.

7. Paragraph 7 of Count III of the Amended Complaint reads:

> "7. From and continuously after the dates of the aforesaid purchases of MAI common stock, Continental knew, but failed to disclose to Plaintiffs the information that said stock was not of an investment quality suitable for trust funds. During said time, Continental knew or should have known that:
>
> (a) During the fiscal year ending September 30, 1967, MAI suffered a decline in earnings, as compared to fiscal 1966, of more than $6 million. Net earnings were $3,219,927 in fiscal 1966; in fiscal 1967 the net loss was $3,129,156;
>
> (b) MAI suffered a net operating loss of $2,923,-293 for the fiscal year ending September 30, 1968;
>
> (c) MAI incurred a special charge of $17,000,000 in fiscal 1968 to reflect the decline in valu. of obsolete inventory;
>
> (d) MAI suffered net losses from operations during the fiscal years ending September 30, 1969 and September 30, 1970, of $9,823,786 and $38,405,769, respectively;

(e) The primary reason for the net losses in each of the aforesaid fiscal years was sharply declining rental revenues from unit record and other data processing equipment principally due to the technological obsolescence of MAI's equipment inventory. As the initial terms of MAI's leases expired the lessees were terminating on short notice, much of the equipment having been leased by them on a month-to-month basis, in order to obtain more technologically advanced equipment from MAI's competitors. As such equipment could not be re-rented or sold without massive losses, MAI commenced writing off said equipment with the aforesaid extraordinary charge of $17,000,000 in the fiscal year 1968 and substantially increased charges to depreciation amounting to $32,400,000 for fiscal year 1970;

(f) During fiscal year 1969, MAI prepared forecasts of projected revenue and estimated costs and expenses for the six-year period ending September 30, 1975. Based on such forecasts, it was estimated that costs and expenses would exceed revenue by approximately $8,000,000. Accordingly, a provision in that amount was charged to fiscal 1969 operations;

(g) MAI was, from a time commencing at least as early as its fiscal year ending September 30, 1968, and continuously thereafter, through at least March 31, 1971, insolvent as such term is used under the Federal Bankruptcy laws."

7. Continental Bank denies the allegations of paragraph 7 of the Amended Complaint, except it admits that the underlying information set forth in subparagraphs (c), (d), (e) and (f) is essentially correct, neither admits nor denies the underlying conclusion of law set forth in subparagraph (g), and denies that it should have "disclosed" any of such matters to Plaintiffs.

8. Paragraph 8 of Count III of the Amended Complaint reads:

"8. Notwithstanding its knowledge of the adverse and continuously deteriorating financial condition of MAI, as

aforesaid, Continental delayed and postponed selling any of said shares purchased by it for the accounts of the Carpenters Pension Fund until November, 1970, when approximately 95% of its investment had been lost."

8. Continental Bank denies the allegations of paragraph 8 of Count III of the Amended Complaint, except it admits that it sold MAI common stock for the Carpenters in November, 1970.

9. Paragraph 9 of Count III of the Amended Complaint reads:

"9. Replying on the professional expertise of Continental, and having no knowledge of the aforesaid material information, Plaintiffs acquiesced in the investment of assets of Carpenters Pension Fund by Continental in MAI securities, and continued so as to acquiesce until the sale of said securities. Relying on the professional expertise of Continental, Plaintiffs were induced to continue their relationship with Continental and were induced not to invoke their power to terminate the aforesaid contractual relationship."

9. Continental Bank denies the allegations of paragraph 9 of Count III of the Amended Complaint, except that Continental Bank admits that the Trustees of the Carpenters acquiesced in the investment of certain of their funds in MAI securities, and continued so so acquiesce until the sale of said securities. Continental Bank further states that Carpenters terminated its relationship with Continental Bank on September 9, 1972.

10.-13. Paragraphs 10-13 of Count III of the Amended Complaint reads:

"10.-13. Plaintiffs adopt and reallege as if the same were set forth here in full the allegations in paragraphs 12 through 15, both inclusive, of Count I hereof."

10.-13. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 12 through 15, both inclusive, of Count I of the Amended Com-

plaint as its answers to paragraphs 10 through 13, both inclusive, of Count III of the Amended Complaint.

COUNT IV

1.-8. Paragraphs 1-8 of Count IV of the Amended Complaint reads:

> "1.-8. Plaintiffs adopt and reallege as if the same were set forth here in full the allegations of paragraphs 1 though 8, both inclusive, of Count I hereof."

1.-8. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 1 through 8, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 1 through 8, both inclusive, of Count IV of the Amended Compaint.

9. Paragraph 9 of Count IV of the Amended Complaint reads:

> "9. Plaintiffs adopt and reallege as if the same were set forth here in full the allegations in paragraph 7 of Count III hereof."

9. Continental Bank adopts and realleges, as though the same were set forth here in full, its answer to paragraph 7 of Count III of the Amended Complaint as its answer to paragraph 9 of Count IV of the Amended Compalint.

10. Paragraph 10 of Count IV of the Amended Complaint reads:

> "10. From and after the aforesaid purchases of MAI common stock to the time of sale thereof, the interests of Continental were continuously in conflict with those of Plaintiffs, as aforesaid. During said time the financial and operating condition of MAI and its subsidiaries was known by Continental to be such that Continental was at all times obligated by virtue of its fiduciary duties to Plaintiffs to liquidate the investment of Carpenters Pension Fund in MAI common stock."

10. Continental Bank denies the allegations of paragraph 10 of Count IV of the Amended Complaint.

11. Paragraph 11 of Count IV of the Amended Complaint reads:

> "11. Nothwithstanding its knowledge and duties, as aforesaid, and because of its aforesaid conflicts of interest, Continental delayed and postponed selling any of said MAI common stock for the account of Carpenters Pension Fund in order to favor and protect its own interests over those of said Fund. Continental failed to disclose to Plaintiffs said delay and postponement and the reasons therefor."

11. Continental Bank denies the allegations of paragraph 11 of Count IV of the Amended Complaint and therefore denies that it should have "disclosed" any of such matters to Plaintiffs.

12-16. Paragraphs 12-16 of Count IV of the Amended Complaint read:

> "12.-16. Plaintiffs adopt and reallege as if the same were set forth here in full the allegations of paragraphs 11 through 15 of Count I hereof."

12.-16. Continental Bank adopts and realleges, as though the same were set forth here in full, its answer to paragraphs 11 through 15, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 12 through 16, both inclusive, of Count IV of the Amended Complaint.

COUNT V

1. Paragraph 1 of Count V of the Amended Complaint reads:

> "1. This Court has jurisdiction of this action under the doctrine of pendent jurisdiction."

1. Continental Bank denies the allegations of paragraph 1 of Count V of the Amended Complaint.

2.-13. Paragraphs 2-13 of Count V of the Amended Complaint read:

"2.-13. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraphs 2 through 5, both inclusive, and paragraphs 7 through 14, both inclusive, of Count I hereof."

2.-13. Continental Bank adopts and realleges, as though the same were set foth here in full, its answers to paragraphs 2 through 5, both inclusive, and paragraphs 7 through 14, both inclusive, of Count I of the Amended Complaint as it answers to paragraphs 2 through 13, both inclusive, of Count V of the Amended Complaint.

14. Paragraph 14 of Count V of the Amended Complaint reads:

"14. The aforesaid conduct of Continental in creating and maintaining said conflicts of interest and failing to disclose them to Plaintiffs, as aforesaid, was a breach of its fiduciary duties to Plaintiffs, and was a breach of its aforesaid contract with Plaintiffs."

14. Continental Bank denies the allegations of paragraph 14 of Count V of the Amended Complaint.

COUNT VI

1. Paragraph 1 of Count VI of the Amended Complaint reads:

"1. This Court has jurisdiction of this action under the doctrine of pendent jurisdiction."

1. Continental Bank denies the allegations of paragraph 1 of Count VI of the Amended Complaint.

2.-5. Paragraphs 2-5 of Count VI of the Amended Complaint read:

"2.-5. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraphs 2 through 5, both inclusive, of Count I hereof."

2.-5. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 2

through 5, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 2 through 5, both inclusive, of Count VI of the Amended Complaint.

6.-8. Paragraphs 6-8 of Count VI of the Amended Complaint read:

> "6.-8. Plaintiffs adopt and reallege as though the same were set forth here in full, the allegations of paragraphs 7 through 9, both inclusive, of Count II hereof."

6.-8. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 7 through 9, both inclusive, of Count II of the Amended Complaint as its answers to paragraphs 6 through 8, both inclusive, of Count VI of the Amended Complaint.

9.-11. Paragraphs 9-11 of Count VI of the Amended Complaint read:

> "9.-11. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraphs 12 through 14, both inclusive, of Count I hereof."

9.-11. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 12 through 14, both inclusive, of Count I of the Amended Complaint as its answers to paragraph 9 through 11, both inclusive, of Count VI of the Amended Complaint.

12. Paragraph 12 of Count VI of the Amended Complaint reads:

> "12. The aforesaid conduct of Continental in purchasing said securities with knowledge of said information, and in failing to disclose said information to Plaintiffs, was a breach of its fiduciary duty to Plaintiffs, and was a breach of its aforesaid contract with Plaintiffs."

12. Continental Bank denies the allegations of paragraph 12 of Count VI of the Amended Complaint.

COUNT VII

1. Paragraph 1 of Count VII of the Amended Complaint reads:

> "1. The Court has jurisdiction of this action under the doctrine of pendent jurisdiction."

1. Continental Bank denies the allegations of paragraph 1 of Count VII of the Amended Complaint.

2.-5. Paragraphs 2-5 of Count VII of the Amended Complaint read:

> "2.-5. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraphs 2 through 5, both inclusive, of Count I hereof."

2.-5. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 2 through 5, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 2 through 5, both inclusive, of Count VII of the Amended Complaint.

6.-8. Paragraphs 6-8 of Count VII of the Amended Complaint read:

> "6.-8. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraphs 7 through 9, both inclusive, of Count III hereof."

6.-8. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 7 through 9, both inclusive, of Count III of the Amended Complaint as its answers to paragraphs 6 through 8, both inclusive, of Count VII of the Amended Complaint.

9.-11. Paragraphs 9-11 of Count VII of the Amended Complaint read:

> "9.-11. Plaintiffs adopt and reallege as though the same were set forth here in full, the allegations of paragraphs 12 through 14 of Count I hereof."

9.-11. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 12 through 14, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 9 through 11, both inclusive, of Count VII of the Amended Complaint.

12. Paragraph 12 of Count VII of the Amended Complaint reads:

> "12. The aforesaid conduct of Continental in delaying and postponing selling any of said shares with knowledge of said information, and in failing to disclose said information to Plaintiffs, was a breach of its fiduciary duty to Plaintiffs and was a breach of its aforesaid contract with Plaintiffs."

12. Continental Bank denies the allegations of paragraph 12 of Count VII of the Amended Complaint.

COUNT VIII

1. Paragraph 1 of Count VIII of the Amended Complaint reads:

> "1. This Court has jurisdiction of this action under the doctrine of pendent jurisdiction."

1. Continental Bank denies the allegations of paragraph 1 of Count VIII of the Amended Complaint.

2.-5. Paragraphs 2-5 of Count VIII of the Amended Complaint reads:

> "2.-5. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraphs 2 through 5, both inclusive, of Count I hereof."

2.-5. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 2 through 5, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 2 through 5, both inclusive, of Count VIII of the Amended Complaint.

6.-9. Paragraphs 6-9 of Count VIII of the Amended Complaint read:

> "6.-9. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraphs 7 through 10, both inclusive, of Count I hereof."

6.-9. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 7 through 10, both inclusive, of Count I of the Amended Complaint as its answers to paragraphs 6 through 9, both inclusive, of Count VIII of the Amended Complaint.

10. Paragraph 10 of Count VIII of the Amended Complaint reads:

> "10. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraph 7 of Count III hereof."

10. Continental Bank adopts and realleges, as though the same were set forth here in full, its answer to paragraph 7 of Count III of the Amended Complaint as its answer to paragraph 10 of Count VIII of the Amended Complaint.

11.-12 Paragraphs 11-12 of Count VII of the Amended Complaint read:

> "11.-12. Plaintiffs adopt and reallege as though the same were set forth here in full, the allegations of paragraphs 10 and 11, both inclusive, of Count V hereof."

11.-12. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 10 and 11 of Count IV of the Amended Complaint as its answers to paragraphs 11 and 12 of Count VIII of the Amended Complaint.

13.-16. Paragraphs 13-16 of Count VIII of the Amended Complaint read:

> "13.-16. Plaintiffs adopt and reallege, as though the same were set forth here in full, the allegations of paragraphs 11 through 14, both inclusive, of Count I hereof."

13.-16. Continental Bank adopts and realleges, as though the same were set forth here in full, its answers to paragraphs 11 through 14 of Count I of the Amended Complaint as its answers to paragraphs 13 through 16 of Count VIII of the Amended Complaint.

17. Paragraph 17 of Count VIII of the Amended Complaint reads:

> "17. The aforesaid conduct of Continental in delaying and postponing selling any of said shares because of said conflicts of interest was a breach of its fiduciary duty to Plaintiffs and was a breach of its aforesaid contract with Plaintiffs."

17. Continental Bank denies the allegations of paragraph 17 of Count VIII of the Amended Complaint.

AFFIRMATIVE DEFENSES

1. Continental Bank states as its first affirmative defense that plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. Continental Bank states as its second affirmative defense that under the doctrine of primary jurisdiction, this Court does not have jurisdiction of the matters alleged in plaintiffs' Complaint, and that proper jurisdiction lies with the Comptroller of Currency pursuant to the National Bank Act, 12 U.S.C., § 1, et seq.

3. Continental Bank states as its third affirmative defense that pursuant to the contractual terms of the agreement between the trustees of Carpenters and Continental Bank, Continental Bank is not liable for the alleged damages to plaintiffs claimed in the plaintiffs' Complaint. The Letter of Instructions to Agent of June 6, 1958 from the Trustees of Carpenters to Continental Bank provides, in part, that:

> "In rendering these investment services, you will be acting merely in an advisory capacity, and therefore it is agreed that you shall be under no liability for any depreciation in

value of any assets held at any time in this account. It is further agreed that any action, recommendation, or comment in regard to the purchase, sale, retention or exchange of any assets of the Fund which may be taken or made by you shall be without liability on your part; . . ." (Letter of Instruction to Agent of June 6, 1958, ¶ 10.)

4. Continental Bank states as its fourth affirmative defense that the individual trustees of Carpenters approved and ratified the investment by Continental Bank of the assets of the Carpenters in the manner alleged by plaintiffs in their Complaint. The Investment Letter of Instructions to Agent of May 18, 1962 from the trustees of Carpenters to Continental Bank provided, in part, that:

> "All actions taken by you in accordance with this letter shall be ratified monthly by resolution of the Trustees at a general or special meeting and a certified copy of such resolution shall be delivered to you." (Investment Letter of Instructions to Agent of May 18, 1962.)

The trustees of Carpenters ratified each purchase of MAI stock by Continental Bank for Carpenters. In addition, plaintiffs approved and ratified the investments by Continental Bank in MAI for Carpenters by not exercising their power to remove Continental Bank as agent of Carpenters until one year after Continental Bank's sale of all MAI stock held by it for Carpenters (Letter of Instructions to Agent of June 6, 1958).

5. Continental Bank states as its fifth affirmative defense that the value of plaintiffs' pension fund appreciated during its period with the Bank, for even though the value of one stock held by the Bank for the fund may have depreciated, other securities held by the Bank for the fund appreciated in value sufficiently to more than off-set any such depreciation. Therefore, plaintiffs have not been damaged.

6. Continental Bank states as its sixth affirmative defense that the claims contained in the Complaint are barred in whole or in part by the applicable statute of limitations, pursuant to Chapter 125½ Illinois Revised Statutes, Section 137.13.

7. Continental Bank states as its seventh affirmative defense that the claims contained in plaintiffs' Complaint are barred under the doctrine of laches due to the failure of plaintiffs to assert such claims within a reasonable time after the plaintiffs knew, or should have known, the alleged facts upon which their claims are based.

8. Continental Bank states as its eighth affirmative defense that this Court does not have jurisdiction of this action because all of the Counts of plaintiffs' Complaint allege only a breach of fiduciary duty, for which jurisdiction properly lies in a state court, there being no diversity if citizenship.

9. Continental Bank states as its ninth affirmative defense that the claims in plaintiffs' Complaint in which certain alleged facts and information are alleged to have been withheld and not disclosed to plaintiffs fail to state a claim upon which relief can be granted under the Federal Securities Laws because said alleged facts and information were not "material".

10. Continental Bank states as its tenth affirmative defense the claims in plaintiffs' Complaint in which Continental Bank is alleged to have failed to disclose certain alleged facts and information to plaintiffs fail to state a claim upon which relief can be granted under the Federal Securities Laws because had such alleged facts and information been disclosed to plaintiffs, plaintiffs would not have been influenced by said alleged facts and information nor would they have relied upon said alleged facts and information.

11. Continental Bank states as its eleventh affirmative defense that this Court does not have pendent jurisdiction of Counts V through VIII of plaintiffs' Complaint, which allege only breach of fiduciary duty, there being no diversity of citizenship.

12. Continental Bank states as its twelfth affirmative defense that the claims in plaintiffs' Complaint in which Continental Bank is alleged to have had an undisclosed conflict of interest fail to state a claim upon which relief can be granted

under Federal or state law because those facts which are alleged in support of the conflict of interest allegation which are true have been general public knowledge at all times material herein.

13. Continental Bank states as its thirteenth affirmative defense that the claims in plaintiffs' Complaint in which Continental Bank allegedly failed to disclose certain alleged facts and information fail to state a claim upon which relief can be granted under Federal and state law because the alleged non-disclosure did not cause the alleged loss complained of in plaintiffs' Complaint.

14. Continental Bank states as its fourteenth affirmative defense that plaintiffs' Complaint fails to state a claim upon which relief can be granted because plaintiffs have not exercised the degree of due care and reasonable diligence which are prerequisites to recovery under Federal and state law.

15. Continental Bank states as its fifteenth affirmative defense that plaintiffs' Complaint does not state a claim upon which relief can be granted under Federal and state law because Continental Bank has acted or not acted, at all times, with complete good faith and candor, disclosing all matters which a prudent and honest trustee would disclose.

16. Continental Bank states as its sixteenth affirmative defense that Continental Bank has acted or not acted, at all times, in complete good faith, in the interest of the beneficiaries or principals of each pension fund, and with prudence and reasonable care.

17. Continental Bank states as its seventeenth affirmative defense that Continental Bank has acted, or not acted according to good business judgment, at all times material herein.

18. Continental Bank states as its eighteenth affirmative defense that the claims in plaintiffs' Complaint in which Continental Bank is alleged to have violated the Federal Securities Laws fail to state a claim upon which relief can be granted because Continental Bank did not act, or did not omit action, with the requisite degree of scienter.

WHEREFORE, defendant Continental Bank demands judgment dismissing the complaint and awarding to Continental Bank its cost and disbursements in this action.

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO
By its attorneys,
MILES G. SEELEY
BRYSON P. BURNHAM

Of Counsel:
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
STate 2-0600

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 6, 1974

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WILBUR F. PELL, JR., *Circuit Judge*

HAROLD G. O'BRIEN, BENJAMIN LIPSON, PATRICK E. GORMAN, GEORGE VEST, JR., J. J. O'DONNELL, EDWARD T. HANLEY, et al.,
Plaintiffs-Appellees,

No. 74-1671, 74-1674
74-1672, 74-1675 *vs.*
74-1673, 74-1683

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(72 C 2551, 660, 3132, 2935, 772, 46)

On consideration of the petition for rehearing and suggestion that if it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

NOTE: Judge Cummings took no part in the consideration of the suggestion.

Local 734 Bakery Drivers Pension Fund Trust and Chicago District Council of Carpenters Pension Fund v. Continental Illinois National Bank and Trust Company of Chicago, a National Banking Association.

United States District Court, Northern District of Illinois, Eastern Division. Nos. 72 C 2551, 72 C 2935, 73 C 46, 73 C 660, 73 C 772, 73 C 3132.

MEMORANDUM OPINION AND ORDER

The six cases before this Court allege violations of Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. §78(j) and common law claims for breach of fiduciary duties and contract. Jurisdiction is based on 15 U.S.C. § 78(aa) for the federal claims; and pendent jurisdiction is asserted as to the state law claims. Additionally, in cause No. 73 C 772, the plaintiff alleges violations of § 17a of the Securities Act of 1933, 15 U.S.C. § 77(q) and bases jurisdiction on 15 U.S.C. § 77(u). In this latter case, diversity of citizenship (28 U.S.C. § 1332) is also alleged. This Court has previously denied various motions to dismiss the claims under Rule 10b-5 and has affirmed this ruling on a motion to reconsider and to stay the proceedings pending consideration of the conflict of interest claims by the Comptroller of the Currency. The defendant bank is now before this Court on a motion for amendment of the orders of this Court dated May 10, 1974 and June 10, 1974, to include the statement specified in 28 U.S.C. § 1292(b) as a prerequisite for interlocutory appeal.

Under Section 1292(b), a District Judge in a civil action may certify an order for interlocutory appeal when he is of the opinion,

> ". . . that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may

materially advance the ultimate termination of the litigation. . . ."

The defendant urges that this test has been met in the present litigation as to the issue of whether the Comptroller of the Currency has primary jurisdiction over the conflict of interest allegations in the various complaints.

Implicit in this motion is the contention that if the Comptroller of the Currency were to find that no conflict of interest existed under the national trust regulations, 12 C.F.R. 9.12, a 10b-5 action could not be maintained. As this Court noted in its prior opinion (pp. 18-19, May 10, 1974), such clearly was not the intendment of the trust regulations, *see Blaney* v. *Florida Nat'l Bank at Orlando*, 357 F. 2d 27, 30 (5th Cir. 1966). A 10b-5 claim, as well as a common law cause of action for breach of fiduciary duties, will lie regardless of any determination by the Comptroller. It is also noteworthy that the Supreme Court and several Courts of Appeals have applied 10b-5 to national banks in diverse aspects of their business, without a suggestion that any primary jurisdiction exists in the Comptroller. *See*, e.g., *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U. S. 6 (1971); *Affiliated Ute Citizens* v. *U. S.*, 406 U. S. 128 (1972); *Carroll* v. *First Nat'l Bank of Lincolnwood*, 413 F. 2d 353 (7th Cir. 1969); *Lehigh Valley Trust Co.* v. *Central Natl Bank of Jacksonville*, 409 F. 2d 989 (4th Cir. 1969). Therefore, in the opinion of this Court, there is neither a "controlling question of law as to which there is substantial ground for difference of opinion" nor will an appeal at this time "materially advance the ultimate termination of [this] litigation".

For the foregoing reasons, the defendant's motion for certification for a interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is denied.

ENTER:

/s/ FRANK J. MCGARR
United States District Judge

Dated July 8, 1974

TABLE OF CONTENTS.

PAGE

Table of Authorities i

Reply of Petitioner 2

Conclusion 11

TABLE OF AUTHORITIES.

C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2nd Cir. 1974) 8, 10

Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) ... 6, 8

Eisen v. Carlisle & Jacquelin, ... U.S. ....., 94 S.Ct. 2140 (1974) 7, 9

Far East Conference v. United States, 342 U.S. 570 (1952) 6, 8

Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 7, 10

Local No. 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963) 5, 7, 8, 9, 10

Thill Securities Corp. v. New York Stock Exchange, 469 F.2d 14 (7th Cir. 1972) 8, 10

United States Alkali Export Association v. United States, 325 U.S. 196 (1945) 6

28 U.S.C. § 1257 .....9, 10

28 U.S.C. § 1291 .....3, 5, 7, 9, 10

Rule 23, F.R. Civ. P. 5

Problems of Fiduciaries Under the Securities Laws, A.B.A., Real Property, Probate and Trust Journal, Vol. 9, No. 3 (Fall 1974) 3, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-626

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

HAROLD G. O'BRIEN, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

BENJAMIN LIPSON, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Petitioner,*

vs.

PATRICK E. GORMAN, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO. *Petitioner,*

vs.

GEORGE VEST, JR., ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO. *Petitioner,*

vs.

J. J. O'DONNELL, ET AL., *Respondents.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO. *Petitioner,*

vs.

EDWARD T. HANLEY, ET AL., *Respondents.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

REPLY OF PETITIONER.

Continental Bank files this brief in support of its petition for certiorari and in reply to the brief filed by Respondents in opposition to that petition.*

In their brief in opposition to the petition for certiorari in these six cases, Respondents attempt to minimize the scope of the primary jurisdiction of the Comptroller of the Currency. On page 2 of their brief, they describe the issue before this Court as being the appealability of an order denying reference to the Comptroller of merely "one of multiple claims." That, however, is not the issue at all. At the heart of the complaints in these six cases is the allegation, variously phrased and often repeated, that Continental Bank was subject to a "conflict of interest" in its fiduciary role simply because it purchased for or held in the accounts of the Respondents securities of corporations to which the Bank also had extended commercial credit. Although the details of this charge are varied, it forms the focus of the present controversy (and beyond doubt presents the most difficult issue which the District Court will face in this litigation). *See* the complaint in the *Vest* case, appearing in the brief of Respondents filed in this Court, Count I, paragraphs 7, 8, 9, 10 and 11, Count IV, paragraphs 10 and 11, Count V and Count VIII. Indeed, the *only* additional issues raised by the complaints in these cases are ordinary issues of fiduciary prudence which may be readily determined upon settled legal prin-

* As a further aid to this Court, Petitioner has requested the Clerk of the Court of Appeals for the Seventh Circuit to transmit the *Brief for Appellant, Continental Illinois National Bank and Trust Company of Chicago* (filed in the Seventh Circuit) as part of the record herein in accordance with Supreme Court Rule 21(1). That brief concisely summarizes the essence of the primary jurisdiction contentions of Petitioner, and will serve to inform this Court of the importance of the underlying issue which was denied review by the Seventh Circuit. The background contained in that brief will greatly clarify the issues before this Court, and, accordingly the instant reply brief will make reference to it where necessary.

ciples. With regard to the complex claim of conflict of interest, however, *which is industry-wide in significance*, the District Court will not be able to act on an informed basis without the aid implicit in the adjudicatory powers of the Comptroller of the Currency. For a complete account of the adjudicatory powers vested in the Comptroller, and the legislative history demonstrating that Congress delegated regulation of conflicts to such administrator, *see* the Seventh Circuit *Brief for Appellant, Continental Illinois National Bank and Trust Company of Chicago*, at pages 14-24.

Respondents also assert that a decision of this Court, requiring immediate review by the Seventh Circuit of the primary jurisdiction issue raised below, would also require, by implication, interim review of a host of other orders. The contention of Petitioner, however, is not so sweeping at all. The decisions of this Court establish that appealability under 28 U.S.C. § 1291 requires consideration of a number of criteria including the "collateral" nature of the order subject to appeal, the settled or conclusive nature of that order, the importance and difficulty of the order, the fundamentality of the order to further proceedings in the District Court, and the measure of injury resulting from delayed review. *See* Petition for Certiorari, pages 11-14.

In a footnote on page 3 of their brief, Respondents attempt to diminish the analysis of Petitioner as to the injuriousness of the "conflict" theory of the complaints herein by labelling such analysis an "in terrorem" argument. The true significance of this litigation, however, and its implication for the nation's commercial banks, is aptly summarized in *Problems of Fiduciaries under the Securities Laws*, a report composed by two section committees of the American Bar Association, and appearing in the A.B.A. *Real Property, Probate and Trust Journal*, Vol. 9, No. 3 (Fall 1974):

> "The 'inherent conflict' theory of the claims in *O'Brien* and *O'Donnell* [two of the six cases here], if successful . . . might well make the maintenance of commercial relation-

> ships with, and investments by a trust department in, the same corporate customer impractical if not impossible. The commercial relationships normally maintained by any large bank are so extensive that to bar trust department investments in securities issued by commercial banking customers would significantly reduce the number of issues of substantial, widely held corporations available for investment. This, in itself, might require curtailment of the activities of either the commercial department or the trust department with respect to this particular issuer or its securities. The practical consequences might well be equivalent to the divestment of the trust department, a result criticized above." Id. at 301-302.*

"Divestment," of course, as threatened by the basic theory of this litigation, would uproot the major premise on which Congress acted in 1913 when it united trust and commercial functions in National Banks. *See* the Seventh Circuit *Brief for Appellant, Continental Illinois National Bank and Trust Company of Chicago,* pages 14-18, 29-35.

In the footnote on page 6 of their brief in opposition here, Respondents seek to show the inapplicability of the primary jurisdiction doctrine by citing a number of decisions which adjudicated claims against a variety of banks without prior reference to any administrative agency. The *non sequitur* advanced, however, is quite apparent. It suffices to say that in *none* of the cited cases was the primary jurisdiction doctrine invoked. In none of these cases was a basic issue involved—such as the present "conflict of interest" issue—which fell squarely within the adjudicatory competence of a bank regulatory agency, which was specifically delegated to that agency by Congress, and which vitally affected financial institutions subject to the jurisdiction of the agency across the entire nation. The citation by Respondents of cases such as these is equivalent to citing a

* The Report states at the outset that "the views expressed here are those of a consensus of the committees described in this report . . ." One of the individuals participating in the work of the committees was Robert Curley, a securities lawyer from Mayer, Brown & Platt, the law firm which serves as counsel for Petitioner herein. *See* Report at pages 292-93.

string of antitrust decisions, in which no primary jurisdiction question was ever raised, to support the erroneous proposition that the primary jurisdiction doctrine is never applicable in antitrust litigation.

On pages 7-10 of their brief, Respondents maintain that the order subject to appeal in these six cases is not reviewable under 28 U.S.C. § 1291 because denial of immediate review will occasion no injury. That, however, is simply not true. The cases here involved are extraordinary in dimension, several of them involving broad classes of plaintiffs under rule 23, F.R. Civ. P. They are already six in number, and a seventh action raising identical issues has recently been filed and assigned to Judge McGarr in the District Court below. It is obvious that a tremendous sacrifice of judicial time and private resources is threatened if these cases lumber ahead, without clarification of the primary jurisdiction question raised below, and without correction of the reversible error occurring at the outset. Moreover, by failing to refer these cases to the Comptroller of the Currency, the District Court has interfered with the regulation of the expert administrator over a pervasively supervised industry. The importance of immediate review is underscored by the grave uncertainty which these suits have engendered throughout the banking industry, an uncertainty casting suspicion upon the most orthodox of commercial and fiduciary practices. *See* the joint report of the A.B.A. committees cited above, *Problems of Fiduciaries Under the Securities Laws, A.B.A. Real Property, Probate and Trust Journal*, Vol. 9, No. 3 (Fall 1974), pages 300-302. The conflict question here raised should be clarified promptly through the expert assistance of the bank regulator deputized by Congress to oversee the industry involved.

This Court has on three occasions stressed the importance of immediate review to correct lower court decisions which erroneously restrict the administrative jurisdiction of a federal agency. This Court has thus acknowledged the magnitude of the injury involved and the need for prompt correction. *See Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371

U.S. 542, 548-550 (1963): "The issue on the merits, namely the legality of the union's picketing, is a matter entirely apart from the determination of whether the Georgia court or the National Labor Relations Board should conduct the trial of the issue. The jurisdictional determination here is as final and reviewable as was the District Court's decision in *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541. . .". *See also, Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952). There, this Court granted the extraordinary remedy of common law certiorari to review an interim decision of the District Court declining to defer to the primary jurisdiction of an administrative agency. That decision underscores the extreme importance of immediate review. *And see, United States Alkali Export Association* v. *United States*, 325 U.S. 196, 202-204 (1945), also granting common law certiorari to review a decision of the District Court, prior to trial, which had denied reference of the action to the administrative agency there involved. The analysis of this Court in the *Alkali Association* case is a complete answer to the contentions of Respondents regarding the necessity of immediate review and the degree of injury resulting from denial thereof:

> "[T]he present case is not the ordinary one of hardship resulting from overruling a plea in bar or denying a preliminary motion which, if well founded, would end the litigation on the merits—decisions which Congress, in the absence of other provisions for appeal, must have contemplated would, in the ordinary course, be reviewed on appeal from the final judgment. The questions now presented involve the propriety of the exercise, by the district court, of its equity jurisdiction, and an asserted conflict between its jurisdiction and that of an agency of Congress . . . Exercise of its jurisdiction by the district court would preclude the [Federal Trade] Commission from carrying out its asserted functions of investigation, recommendation and report before any suit by the United States. This would be more than the mere denial of the right of a suitor such as Congress must have contemplated would be cor-

> rected by recourse to the prescribed appeal procedure. *It would be a frustration of the functions which Congress has directed the Commission to perform and of the policy which Congress presumably sought to effectuate by their performance. The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment.*" Id. at 203-204. (Emphasis supplied.)

Moreover, the repeated emphasis of Respondents upon "irreparable injury" as a *controlling* criterion is wholly inconsistent with the practical or pragmatic approach to appealability under 28 U.S.C. § 1291 which this Court has adopted. As shown in the instant Petition for Certiorari, pages 11-14, the decisions of this Court require a weighing of the advantages and disadvantages of immediate review, rather than the adoption of rigid verbal formulae such as "irreparable injury." *See Eisen* v. *Carlisle & Jacquelin*, ... U.S. ....., 94 S.Ct. 2140, 2149-2150 (1974), *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-154 (1964), and *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-49 (1963), all stressing the pragmatic advantages of immediate review.

On pages 9 and 10 of their brief, respondents maintain that the order of Judge McGarr, declining to respect the primary jurisdiction of the Comptroller of the Currency, is not "fundamental" to these cases. The theory is that because the complaints in these cases raise garden variety allegations of fiduciary "imprudence" as well as the charge of "conflict of interest," any failure to stay proceedings pending resolution of the "conflict" charge is not sufficiently basic or fundamental to be reviewed. That, however, ignores the fact that failure to refer these cases to the Comptroller for initial decision will focus discovery in the wrong forum; that the doctrine of primary jurisdiction re-

quires stay of proceedings in the District Court while the agency acts; that the District Court, by rejecting the aid implicit in the views of the Comptroller, will in fact complicate and protract this litigation; and that proceeding without the opinion of the Comptroller will infect with reversible error any decision ultimately reached by the District Court on the question of "conflict of interest."

On pages 10-13 of their brief, Respondents argue that the decision of the District Court, erroneously declining to refer these cases to the Comptroller for initial decision, is not separable from the merits of the controversy. That argument, however, is flatly refuted by *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-550 (1963), which held that the decision to proceed in a judicial, rather than an administrative forum, is "collateral" to the merits of the cause of action within the meaning of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). The argument is also rejected by *Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952), which granted interim review of an order of the District Court refusing to uphold the primary jurisdiction of the agency there involved. In the *Far East* case, as in *Curry*, the decision involved was separable from the merits of the litigation and it could be effectively reviewed on an immediate basis. It follows, therefore, that the Court of Appeals for the Second Circuit correctly determined that decisions under the doctrine of primary jurisdiction are collateral to the merits of the underlying litigation in *C.A.B.* v. *Aeromatic Travel Corp.*, 489 F.2d 251, 253 (2nd Cir. 1974), and that the Court of Appeals for the Seventh Circuit, in *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14, 16 (7th Cir. 1972) and in the instant cases (which adopted the *Thill* approach), has misapplied the concept of "collateral" order.*

*On pages 10 and 11 of their brief, Respondents propose that an order is "collateral" only if a reversal on appeal following a judgment on the merits would leave the order untouched. This formulation is announced *ex cathedra;* not a single authority is cited in its support.

[*Footnote continued on next page.*]

On pages 12-13 of their brief, Respondents contend that the case of *Local 438 Construction and General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963), is not relevant to this petition. In this regard, Respondents have sought to cultivate insignificant factual distinctions—distinctions which do not amount to differences in legal principle. It is of course obvious that the Court in *Curry* had before it an "exclusive," rather than "primary," jurisdiction ruling of the lower court. However, that fact has no bearing whatsoever on the question whether the preliminary routing decision is separable from and collateral to the merits of the controversy. Nor does that fact have any bearing on the question whether the regulatory authority of the agency is of such importance that review of decisions impairing it must be promptly had. Furthermore, it is worthwhile to recall that the doctrine of primary jurisdiction is a corollary of the doctrine of exclusive jurisdiction; that the primary jurisdiction decisions of this Court are predicated on earlier exclusive jurisdiction precedents; and that both the primary and exclusive jurisdiction doctrines subserve parallel policies in our federal system.

On page 13 of their brief, Respondents assert that decisions of this Court construing the expression "final judgments or decrees" in 28 U.S.C. § 1257 are of no utility in construing the expression "final decisions" in 28 U.S.C. § 1291. However, it is too elementary for extended discussion that provisions in the same enactment (the federal judicial code) are to be construed *in pari materia*. That is not to say, of course, that decisions construing the finality requirement under 28 U.S.C. § 1257 are

---

The test of "collateralness" or separability enunciated by this Court, contrary to that espoused by Respondents, is summarized in *Eisen* v. *Carlisle & Jacquelin*, ...U.S. ....., 94 S.Ct. 2140, 2150 (1974), and *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-49 (1963). The issue is whether the order resolves a right which is an ingredient in the cause of action on the merits and whether, therefore, the order cannot be effectively reviewed until the merits are entirely adjudged. Applying this standard, it is plain that the order appealed from herein is not a resolution of a right which is an ingredient in the cause on the merits, and it is equally plain that effective review may be presently had.

"controlling" in construing the finality requirement under 28 U.S.C. § 1291. It may be conceded that they are not "controlling;" instead, they are highly instructive and provide sound guidance. The decisions of this Court make that quite clear. *See e.g., Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-549 (1963), looking to decisions under 28 U.S.C. § 1291 for guidance in construing 28 U.S.C. § 1257. *See also, Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-154 (1964).

Lastly, on pages 13-15 of their brief, respondents argue that there is no conflict between the positions of the Second and Seventh Circuits on the appealability point before this Court. However, the position of the Second Circuit, taken in *C. A. B.* v. *Aeromatic Travel Corp.*, 489 F. 2d 251, 253 (2nd Cir. 1974), is an adoption of the approach of this Court and a rejection of the position of the Seventh Circuit. In the *Aeromatic* case, the Second Circuit concluded that threshold decisions under the primary jurisdiction doctrine regarding the proper routing of litigation were collateral orders; the Seventh Circuit, in *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F. 2d 14, 16 (7th Cir. 1972), reached precisely the opposite conclusion. In the *Aeromatic* case, the Second Circuit concluded that the importance of the primary jurisdiction ruling to the proper functioning of the federal regulatory system was sufficient to warrant immediate review; in the *Thill* case, as in the present cases, the Seventh Circuit did not attach sufficient importance to this factor to grant immediate review. Although there are circumstantial differences between the Second and Seventh Circuit cases, these differences cannot blur the plain fact that the Seventh and Second Circuits are embarked on fundamentally opposed analyses in assessing the appealability of primary jurisdiction reference orders, and that the Second Circuit, unlike the Seventh, had adopted a "practical" rather than a rigid or technical analysis as required by the decisions of this Court.

CONCLUSION.

For the reasons stated above, and in the Petition for Certiorari filed on November 21, 1974, a writ of certiorari should be granted in these six cases.

Respectfully submitted,

MILES G. SEELEY,
BRYSON P. BURNHAM,
STEPHEN M. SHAPIRO,
231 South LaSalle Street,
Chicago, Illinois 60604,
Attorneys for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
312-782-0600.